SUPREME COURT OF THE UNITED STATES.

No 250.

FRANCIS O. J. SMITH, PLAINTIFF IN ERROR,

vs.

SAMUEL F. B. MORSE AND AMANDA O. VAIL, EXECUTRIX, AND THEODORE LITTLE AND GEORGE I. COBB, EXECUTORS OF ALFRED VAIL, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	a	1
Clerk's certificate	1	1
Declaration	3	2
Plea	13	5
Replication	18	7
Verdict	20	7
Judgment	21	8
Bond	23	9
Copy of citation	25	10

tioned, and that the following pages, numbered from one to twenty-eight, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the above-entitled case, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 29th day of November, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the said United States the ninety-second.

[SEAL.] KENNETH G. WHITE, *Clerk.*

[5-ct rev. stamp, cancelled.]

3 Pleas in the Circuit Court of the United States for the southern district of New York, of the tenth day of February, one thousand eight hundred and sixty-four, in the term of October, one thousand eight hundred and sixty-three.

Witness the Honorable Samuel Nelson, justice.

KENNETH G. WHITE, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK :

Be it remembered that on the tenth day of February, in this same term, in the Circuit Court of the United States for the southern district of New York, before the justice thereof, at the United States Court buildings, in the city of New York in said district, come Samuel F. B. Morse, and also Amanda O. Vail, executrix, and Theodore Little and George Cobb, executors of the last will and testament of Alfred Vail, deceased, by Tracy and Olmstead, their attorneys, and bring into the said court before the said justice thereof, now here, their certain bill against Frances O. J. Smith, being in custody, &c., of a plea of breach of covenant, which said bill follows in these words, that is to say :

SOUTHERN DISTRICT OF NEW YORK, *ss*:

4 Samuel S. B. Morse, a citizen of the State of New York, and Amanda O. Vail, as executrix, and Theodore Little and George Cobb, as executors of the last will and testament of Alfred Vail, deceased, citizens of the State of New Jersey, plaintiffs in this suit, by Tracy and Olmstead, their attorneys, complain of Francis O. J. Smith, a citizen of the State of Maine, defendant in this suit, being in custody, etc., of a plea of breach of covenant, for that whereas the said plaintiff, Samuel S. B. Morse, now is a citizen of the State of New York, and the said plaintiffs, Vail, Little and Cobb, now are citizens of the State of New Jersey, and the said Alfred Vail at the time of his death was a citizen of the State of New Jersey, and the said defendant now is a citizen of the State of Maine; and whereas heretofore, to wit, on the eighth day of October, one thousand eight hundred and fifty-nine, to wit, at the city of New York, in the southern district of New York aforesaid, by a certain mutual agreement in writing, then and there made by and between the said plaintiffs, by the name and description of Samuel F. B. Morse and the

5 executors of Alfred Vail, deceased, of one part, and the said defendants of the other part, which the said plaintiffs now bring into court here, sealed with the seal of the said plaintiffs, by Amos Kendall, their agent, and also sealed with the seal of said Kendall in his own right, and also sealed with the seal of the said defendant, the date whereof is the same day and year last aforesaid, it was recited in substance and effect among other things that a certain claim had been and was made by the said defendant against the said Morse and the said Alfred Vail in his lifetime for stock and dividends in the Washington and New Orleans Telegraph Company, alleged to have been issued to the said Morse and Alfred Vail, or their assignees, which, it was alleged, ought, by virtue of the contract for exchange of interest in the Boston & New York and Washington and New Orleans lines of telegraph, between the said Morse and Alfred Vail and the said defendant, to have been issued to the said defendant or his assigns other than the said Morse and Alfred Vail, together with all dividends which might have accrued thereon, alleged not to
6 have been credited in a certain suit theretofore brought by the said Morse and Alfred Vail against the said defendant in the Superior Court of the city of New York; and also that certain claims had been and were made by the said plaintiffs to any stock in said company which might have been erroneously issued to the said defendant or his assigns, which, in pursuance of the said contract of exchange, ought to have been issued to the said Morse and Alfred Vail in their own right, or to their assignees, together with all dividends which had accrued thereon; and whereas, in and by the said mutual agreement in writing, it was mutually covenanted and agreed by and between the said plaintiffs of one part and the said defendant of the other part, that the said claims above mentioned should be referred to the final decision and arbitration of Thomas R. Walker and H. O. Alden, esquires, and an umpire if needful, who should adjudicate the same upon and according to facts that should be admitted or satisfactorily proved from the records of the said Washington and New Orleans
7 company, or other evidence satisfactory to said arbitrators, provided that if it should appear that any balance found due to either party under the contract aforesaid had been otherwise accounted for in whole or in part in any settlement that had taken place, the amount so accounted for should be set off against the amount so found due; and the said plaintiffs in fact say that they, the said plaintiffs, and the said defendant, afterwards, to wit, on the thirteenth day of December, one thousand eight hundred fifty-nine, to wit, at the city of New York, in the said district, in pursuance of the said mutual agreement in writing, and the covenants and agreements aforesaid, did mutually appear before the said Walker and the said Alden and did then and there place before them the said mutual agreement in writing, and did endorse thereon in their presence, and subscribe a stipulation binding themselves to abide and perform the award of said arbitrators without exceptions to or appeal from their decision, and also did present, refer and submit to them, as such arbitrators, the several claims aforesaid, and did produce before and offer

a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the Circuit Court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Francis O. J. Smith, plaintiff in error, and Samuel F. B. Morse and Amanda O. Vail, executrix, and Theodore Little and George Coff, executors of the last will and testament of Alfred Vail, deceased, defendants in error, and in which a judgment was entered on the 17th day of July, 1867, for the sum of twelve thousand one hundred and eighty-two dollars and sixty-three cents, in favor of said defendants in error, and in which a manifest error hath happened, to the great damage of the said Francis O. J. Smith, plaintiff in error, as is said, and as appears by his complaint, we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that the record and proceedings aforesaid, being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States, ought to be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this third day of December, in the year of our Lord one thousand eight hundred and sixty-six, and of the independence of the United States the ninety-first.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America
for the Southern District of New York,
in the Second Circuit.

Endorsed: U. S. Circuit Court. Francis O. J. Smith, pl'ff in error, *ag'st* Samuel F. B. Morse *& al.*, de'fts in error. Writ of error. The within writ is allowed, October 3d, 1867. Sam'l Blatchford, dist. judge. Filed Oct. 7, '67.

1 FRANCIS O. J. SMITH, pl'ff in error,
ag'st
SAMUEL F. B. MORSE *& als.*, def'ts in error.

By virtue of the within writ of error, and in obedience thereto, I, Kenneth G. White, clerk of the Circuit Court of the United States for the southern district of New York, do hereby certify and return the judgment and proceedings in the case in the writ within men-

tioned, and that the following pages, numbered from one to twenty-eight, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the above-entitled case, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 29th day of November, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the said United States the ninety-second.

[SEAL.] KENNETH G. WHITE, *Clerk.*

[5-ct rev. stamp, cancelled.]

3 Pleas in the Circuit Court of the United States for the southern district of New York, of the tenth day of February, one thousand eight hundred and sixty-four, in the term of October, one thousand eight hundred and sixty-three.

Witness the Honorable Samuel Nelson, justice.

KENNETH G. WHITE, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK :

Be it remembered that on the tenth day of February, in this same term, in the Circuit Court of the United States for the southern district of New York, before the justice thereof, at the United States Court buildings, in the city of New York in said district, come Samuel F. B. Morse, and also Amanda O. Vail, executrix, and Theodore Little and George Cobb, executors of the last will and testament of Alfred Vail, deceased, by Tracy and Olmstead, their attorneys, and bring into the said court before the said justice thereof, now here, their certain bill against Frances O. J. Smith, being in custody, &c., of a plea of breach of covenant, which said bill follows in these words, that is to say :

SOUTHERN DISTRICT OF NEW YORK, *ss*:

4 Samuel S. B. Morse, a citizen of the State of New York, and Amanda O. Vail, as executrix, and Theodore Little and George Cobb, as executors of the last will and testament of Alfred Vail, deceased, citizens of the State of New Jersey, plaintiffs in this suit, by Tracy and Olmstead, their attorneys, complain of Francis O. J. Smith, a citizen of the State of Maine, defendant in this suit, being in custody, etc., of a plea of breach of covenant, for that whereas the said plaintiff, Samuel S. B. Morse, now is a citizen of the State of New York, and the said plaintiffs, Vail, Little and Cobb, now are citizens of the State of New Jersey, and the said Alfred Vail at the time of his death was a citizen of the State of New Jersey, and the said defendant now is a citizen of the State of Maine; and whereas heretofore, to wit, on the eighth day of October, one thousand eight hundred and fifty-nine, to wit, at the city of New York, in the southern district of New York aforesaid, by a certain mutual agreement in writing, then and there made by and between the said plaintiffs, by the name and description of Samuel F. B. Morse and the

5 executors of Alfred Vail, deceased, of one part, and the said defendants of the other part, which the said plaintiffs now bring into court here, sealed with the seal of the said plaintiffs, by Amos Kendall, their agent, and also sealed with the seal of said Kendall in his own right, and also sealed with the seal of the said defendant, the date whereof is the same day and year last aforesaid, it was recited in substance and effect among other things that a certain claim had been and was made by the said defendant against the said Morse and the said Alfred Vail in his lifetime for stock and dividends in the Washington and New Orleans Telegraph Company, alleged to have been issued to the said Morse and Alfred Vail, or their assignees, which, it was alleged, ought, by virtue of the contract for exchange of interest in the Boston & New York and Washington and New Orleans lines of telegraph, between the said Morse and Alfred Vail and the said defendant, to have been issued to the said defendant or his assigns other than the said Morse and Alfred Vail, together with all dividends which might have accrued thereon, alleged not to

6 have been credited in a certain suit theretofore brought by the said Morse and Alfred Vail against the said defendant in the Superior Court of the city of New York; and also that certain claims had been and were made by the said plaintiffs to any stock in said company which might have been erroneously issued to the said defendant or his assigns, which, in pursuance of the said contract of exchange, ought to have been issued to the said Morse and Alfred Vail in their own right, or to their assignees, together with all dividends which had accrued thereon; and whereas, in and by the said mutual agreement in writing, it was mutually covenanted and agreed by and between the said plaintiffs of one part and the said defendant of the other part, that the said claims above mentioned should be referred to the final decision and arbitration of Thomas R. Walker and H. O. Alden, esquires, and an umpire if needful, who should adjudicate the same upon and according to facts that should be admitted or satisfactorily proved from the records of the said Washington and New Orleans

7 company, or other evidence satisfactory to said arbitrators, provided that if it should appear that any balance found due to either party under the contract aforesaid had been otherwise accounted for in whole or in part in any settlement that had taken place, the amount so accounted for should be set off against the amount so found due; and the said plaintiffs in fact say that they, the said plaintiffs, and the said defendant, afterwards, to wit, on the thirteenth day of December, one thousand eight hundred fifty-nine, to wit, at the city of New York, in the said district, in pursuance of the said mutual agreement in writing, and the covenants and agreements aforesaid, did mutually appear before the said Walker and the said Alden and did then and there place before them the said mutual agreement in writing, and did endorse thereon in their presence, and subscribe a stipulation binding themselves to abide and perform the award of said arbitrators without exceptions to or appeal from their decision, and also did present, refer and submit to them, as such arbitrators, the several claims aforesaid, and did produce before and offer

and give to them, as such arbitrators, the respective proofs
8 of them the said plaintiffs, and of him the said defendant, and then and from time to time there did present, offer and cause to be made before them, as such arbitrators, arguments of the respective counsel of the said plaintiff and the said defendant touching the said several claims ; and that the said Walker and the said Alden took upon them the duty and office of arbitrators as aforesaid, and as such arbitrators fully heard the parties aforesaid, and carefully considered the matters as submitted to their decision, and they were unable to agree thereon ; and that the said Walker and the said Alden, as such arbitrators as aforesaid, after such full hearing and a careful consideration of the matters so submitted to their decision, so being unable to agree thereon, to wit, on the fifteenth day of January, one thousand eight hundred and sixty-two, to wit, at the place in the district last aforesaid, in pursuance of the said mutual agreement in writing of the said plaintiffs and the said defendant, did duly appoint Abijah Mann, junior, esquire, to be the umpire provided for by the
9 agreement and covenants aforesaid, whereof the said defendant afterwards, to wit, on the same day and year and at the same place last aforesaid, had notice; and that the said Abijah Mann, junior, afterwards, to wit, on the same day and year and at the same place last aforesaid, took upon him the duties of such umpire, and gave notice to the said parties, the said plaintiff and the said defendant, that they might have the opportunity to be heard before him as such umpire; and that the parties aforesaid, namely, the said plaintiffs and the said defendant, afterwards, to wit, on the twenty-ninth day of January, one thousand eight hundred and sixty-two, and from time to time thereafter, to wit, at the place in the district last aforesaid, in pursuance of the said mutual agreement in writing and the covenants and agreements aforesaid, did mutually appear before the said Abijah Mann, junior, and present, refer, and submit to him, as such umpire, the said several claims, and did produce before and offer and give to him as such umpire their respective
10 proofs, and did present, offer, and cause to be made before him as such umpire the arguments of their respective counsel touching the said several claims; and that the said Abijah Mann, junior, as such umpire and in pursuance of the premises, afterwards, to wit, on the twenty-second day of May, one thousand eight hundred and sixty-two, to wit, at the place in the district last aforesaid, made, subscribed, and published his final determination and award in writing, whereby he as such umpire did determine and award that the said Samuel S. B. Morse and the executors of Alfred Vail, deceased, (the said plaintiff meaning,) recover of the said F. O. J. Smith (the said defendant meaning) seven thousand two hundred and fifteen dollars and seventy-three cents, to be payable in stock of the Washington and New Orleans Telegraph Company, and three thousand four hundred and thirty-eight dollars and sixty-eight cents, payable in cash, of all which the said defendants then and there had notice; and that the said plaintiffs afterwards, and before the
11 commencement of this suit, to wit, on the twenty-ninth day

of May, one thousand eight hundred and sixty-two, to wit, at the place in the district last aforesaid, demanded and required of and from the said defendant the performance of the said award, and the making of the payments in stocks and money therein mentioned, as aforesaid; and the said plaintiffs then and there were ready and willing to accept and receive the said stock, and also then and there at all times hitherto to receive the said sum of money; yet the said defendant, knowing the premises, but disregarding his said covenant and agreements, has neglected and refused hitherto, and still neglects and refuses, to perform the said award, or to make the payments aforesaid, or any part thereof; and that the said stock of the Washington and New Orleans Telegraph Company in the said award mentioned, at the time of the said making and publication of the said award and of the making of said demand thereof, and thence hitherto, has been of great value; and the said sum of seven thousand two hundred and fifteen dollars and seventy-three cents, payable
12 in said stock at the time when the same became payable, as aforesaid, was, and thence hitherto has been, of great value, to wit, of the value of fifteen thousand dollars, whereof the said defendant then and there had notice; and that by reason and by means of the premises the plaintiffs lost the use, benefit, profits, and dividends of the said stock, and great gains which they might have realized from the sale thereof, and that the said stock has lost value and become depreciated in the market since said default to deliver the same, to a large amount, and the plaintiffs thereby have suffered great damages, to wit, the sum of twenty thousand dollars; and the said plaintiffs bring into court here the letters testamentary of the last will and testament of the said Alfred Vale, deceased, whereby it appears that the said plaintiff, Amanda O. Vale, is the executrix, and the said Theodore Little and George Cobb are the executors of the last will and testament of the said Alfred Vail, deceased.

Wherefore the said plaintiffs say that they have been and are
13 injured by the aforesaid breach by the said defendant so committed of the said covenants and agreements, and have sustained damages thereby to twenty thousand dollars; and thereof they bring suit, &c.

Afterwards, to wit, on the third Monday of October, in the term of October, A. D. 1864, in the court aforesaid, before the justice aforesaid, at the place aforesaid, come the said plaintiffs, by their said attorneys; also comes the said defendant, Francis O. J. Smith, by Richard H. Huntley, his attorney.

And now the said defendant by himself, and Richard H. Huntley, his attorney, comes and defends the wrong and injury, when, where, &c., and says that said mutual agreement in the plaintiffs' declaration set forth is not his deed; and of this the said defendant puts himself upon the country.

And for a further plea in this behalf the said defendant says that the said plaintiffs ought not to have and maintain their aforesaid action thereof against him, because he says that said Amanda O.
14 Vail, as executrix of said Alfred Vail, and said Theodore Lit-

tle and George Cobb, as executors of said Alfred Vail, did not at any time make and enter into a mutual agreement in writing, under seal, with said defendant, as is alleged in the plaintiffs' declaration; and that at the time of the alleged making of and entering into the supposed mutual agreement in the plaintiffs' declaration mentioned, the said executrix and executors of said Alfred Vail, deceased, had not been vested with legal or proper authority to make and enter into valid covenants, by writing obligation and under seal, mutually with this defendant, for and in behalf of the said Alfred Vail, deceased, or of his estate, nor in their alleged capacities of executrix and executors of the said Alfred Vail, deceased, nor to authorize or empower any other person or agent so to do in their behalf, and never did so enter into or make such mutually valid writing by Amos Kendall, as is set forth in the plaintiffs' declaration aforesaid; and the said writing was and is wholly void in law, and this
15 the defendant is ready to verify; and of this he puts himself upon the country.

And for a further plea in this behalf made, the said defendant says that the said plaintiff ought not to have and maintain their aforesaid action thereof against him; because he says that the said Thomas R. Walker and H. O. Alden, in the plaintiffs' declaration mentioned, never did, at any time, make any award upon any hearing before said arbitrators had at any time between said plaintiffs and said defendants, and did not at the time, and in the manner alleged in the plaintiffs' declaration, duly appoint, in pursuance of the supposed mutual agreement in writing mentioned in the plaintiffs' declaration, and then and there had no right or authority to appoint for said plaintiffs and said defendant Abijah Mann, junior, named in said declaration to be the umpire provided for by the agreements and covenants in said declaration mentioned, upon the claim in said declaration mentioned; and, because he says further, that said Abijah Mann, junior, did not, at the time mentioned in said declaration, nor at any time, by any competent authority vested in him as umpire,
16 pursuant to the supposed mutual agreement in writing aforesaid, make, subscribe, declare and publish, any determination and award of and concerning the premises named in said supposed mutual agreement, nor that said plaintiff, to wit, Samuel S. B. Morse, Amanda O. Vail, executrix of Alfred Vail, deceased, Theodore Little and George Cobb, executors of said Alfred Vail, deceased, recover of said defendant the sums of money, and of telegraph stock, named in said plaintiffs' declarations, and this said defendant is ready to verify.

Wherefore he prays judgment that the plaintiff ought not to have and maintain their aforesaid action thereof against him, and of this he puts himself upon the country.

And the said plaintiffs, by their attorneys aforesaid, as to the said plea of the said defendant, by him first above pleaded, and whereof he has put himself upon the country, etc., do the like, etc.

And the said plaintiffs, as to the said plea of the said defendant, by him secondly above pleaded, say that they, the said plain-

17 tiffs, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against him, the said defendant, because they say that the said Amanda O. Vail, as executrix of the said Alfred Vail, and the said Theodore Little and George Cobb, as executors of the said Alfred Vail, at the said time, when, &c., in the said declaration mentioned, did make and enter into the mutual agreement, in writing, under seal, with the said defendant, in the said declaration mentioned, in manner and form as therein alleged, and that the said executrix, and executor of the said Alfred Vail, deceased, at the said time, when, &c., had been, and were, vested with legal and proper authority to make and enter into valid covenants, by writing, obligatory, and under seal, mutually with the said defendant, for and in behalf of the said Alfred Vail, deceased, and of his estate, and in the alleged capacities of executrix and executor of the said Alfred Vail, deceased, and to authorize and
18 empower any other person or agent so to do in their behalf, and in fact did so enter into and make such mutually valid writing, by the said Amos Kendall, as is set forth in the said declaration, in manner and form as in the said declaration alleged, and that the said writing, at the time of the said making thereof, was, and thence hitherto has been, and still is, valid and of force, without this that the said writing was or is void in law, in manner and form, as in that plea alleged; and this they, the said plaintiffs, pray may be enquired of by the country, &c., and the said defendant does the like, etc.

And the said plaintiffs, as to the said plea of the said defendant, by him thirdly above pleaded, say that they, the said plaintiffs, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against him, the said defendant, because they say that the said Thomas R. Walker and H. O. Alden, in the said declara-
19 tion mentioned, at the said time, when, &c., upon a hearing had before them, in manner and form, as in the said declaration mentioned, at the same time, when, &c., duly appointed, in pursuance of the said mutual agreement in writing, in the said declaration mentioned, and then and there had full right and authority to appoint for the said plaintiffs and the said defendant the said Abijah Mann, junior, in the said declaration mentioned, to be the umpire provided for by the said agreements and covenants in the said declaration mentioned, upon the said claims, in the said declaration mentioned, in manner and form as therein alleged, and that the said Abijah Mann, junior, at the said time, when, &c., in the said declaration mentioned, by competent authority vested in him as such umpire, pursuant to the said mutual agreement in writing, made, subscribed, declared and published the said determination and award of and concerning the premises named in the said declaration, in manner and form as in the said declaration alledged, and that
20 the said plaintiffs recovered of the said defendant the said sum of money and of telegraph stock named in the said de-

claration, in manner and form, as in the said declaration alledged, and this they, the said plaintiffs, pray may be inquired of by the country, &c., and the said defendant does the like, etc.

Therefore it is ordered that the issue above joined be tried at the term of this court to be held at the place aforesaid on the third day of November, in the term of October, one thousand eight hundred and sixty-five.

At which day and place in the court aforesaid, before the justices aforesaid, come the parties aforesaid by their respective attorneys aforesaid, and the jurors of the jury also come, who to speak the truth of the matters aforesaid, being chosen, tried and sworn upon their oaths, do say that the said mutual agreement in the said declaration mentioned in is the deed of him the said defendant, and [and] that the said executrix and executors of said Alfred Vail did make and enter into said mutual agreement as alleged in said declaration,
21 and that they then had been vested with legal and proper authority to make and enter into valid covenants by writing obligatory and under seal for and on behalf of said Alfred Vail and his estate, and the same was and is valid ; and that said Walker and Alden, upon a hearing had before them as in the said replication in that behalf mentioned, duly appointed and had full right and authority to appoint the said Abijah Mann, junior, to be the umpire as in said declaration mentioned ; and that said umpire, in pursuance of said mutual agreement and said appointment, did make, sign and publish the said award as in the said declaration mentioned as therein alleged; and they do find a general verdict for the plaintiffs, and assess their damages at ten thousand seven hundred sixty-two dollars ninety-seven cents.

Therefore it is considered by the said court, before the said justice thereof now here, that the said plaintiffs do recover against the said defendant the said sum of ten thousand seven hundred
22 sixty-two dollars ninety-seven cents, so found by the jury as aforesaid, and also fourteen hundred nineteen dollars sixty-six cents for interest to this day on said verdict, and for the costs and charges of the said plaintiffs in about their suit in this behalf expended ; which said damages, costs and charges in the whole amount to twelve thousand one hundred and eighty-two dollars and sixty-three cents, and that the plaintiffs have execution thereof.

Judgment signed this 17th day of July, A. D. 1867.

R. E. STILWELL, *Dep. Clerk.*

Endorsed: U. S. Circuit Court, S. D. N. Y., vol. 2, p. 53, Samuel F. B. Morse et al. *vs.* Francis O. J. Smith. Judgment roll. Tracy & Olmstead, att'ys. Damages, $10,762 97; costs, 1,419 66 ; $12,182 63. Filed July 17th, 1867.

23 Supreme Court of the United States.

Bond for costs.

FRANCIS O. J. SMITH, plaintiff in error,
vs.
SAMUEL F. B. MORSE, AMANDA O. VAIL, executrix, Theodore Little and George Cobb, executors of the last will and testament of Alfred Vail, deceased, deft's in error.

Know all men by these presents, that we, Francis O. J. Smith and Francis B. Smith, both of the city of Brooklyn, and John W. Lane, of the city of New York, are held and firmly bound unto the above-named defendants in error, in the sum of twelve thousand one hundred and eighty-two dollars and sixty-three cents, [dollars,] to be paid to the said defendants in error, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals, and dated the 2d day of October, in the year of our Lord one thousand eight hundred and sixty-seven.

Whereas the above-named Francis O. J. Smith hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit, by the judge of the Circuit Court of the United States, for the southern district of New York:

Now therefore, the condition of this obligation is such, that if the above-named Francis O. J. Smith shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make his plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

[L. S.] FRANCIS O. J. SMITH
[L. S.] T. B. SMITH.
[L. S.] J. W. LANE.

Sealed and delivered, and taken and acknowledged this 2d day of Oct., 1867, before me.

R. E. STILWELL, *U. S. Com.*

24 UNITED STATES OF AMERICA, *Southern District of New York, ss:*

Francis B. Smith and John W. Lane, being duly sworn, do depose and say, and each for himself says, that he is worth the sum of twenty-five thousand dollars, over and above all his just debts and liabilities.

F. B. SMITH.
J. W. LANE.

Sworn to this 2d day of Oct., A. D. 1867, before me.

R. E. STILWELL, *U. S. Com.*

I approve of the form and execution of the foregoing bond, and of the sufficiency of the sureties.

Dated Oct. 3, 1867. SAM'L BLATCHFORD.

Endorsed: U. . Circuit Court. F. O. J. Smith, pl'ff in error, *vs.* Sam. F. B. Morse, & als., def'ts in error. Filed this 3d day of Oct., 1867.

25 By the Hon. Samuel Blatchford, one of the judges of the Circuit Court of the United States for the Southern district of New York, in the 2d circuit.

To Samuel F. B. Morse and Amanda O. Vail, executrix, and Theodore Little and George Cobb, executors of the last will and testament of Alfred Vail, deceased:

Whereas there was lately issued out of the Circuit Court of the United States a writ of error, directed to the judge of the said Circuit Court of the United States for the southern district of New York, stating that in the record and proceedings, as also in the rendition of the judgment of a plea in the said court before the judge thereof, Francis O. J. Smith, plaintiff in error, and Samuel F. B. Morse and Amanda O. Vail, executrix, and Theodore Little and George Cobb, executors of the last will and testament of Alfred Vail, deceased, defendants in error, a manifest error hath happened to the great damage of said Francis O. J. Smith;

26 And whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated term of the Supreme Court of the United States, to be held at the city of Washington on the first Monday of December next: You are therefore hereby cited to appear before the said Supreme Court at the city of Washington, on the said first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the 3d day of October, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the United States the ninety-second.

SAM'L BLATCHFORD, *Dist. Judge.*

Southern Dist. of New York, ss:

Stanley Huntley, being duly sworn, says, that on the 4 day of October, inst., he served the above citation on Charles Tracy,

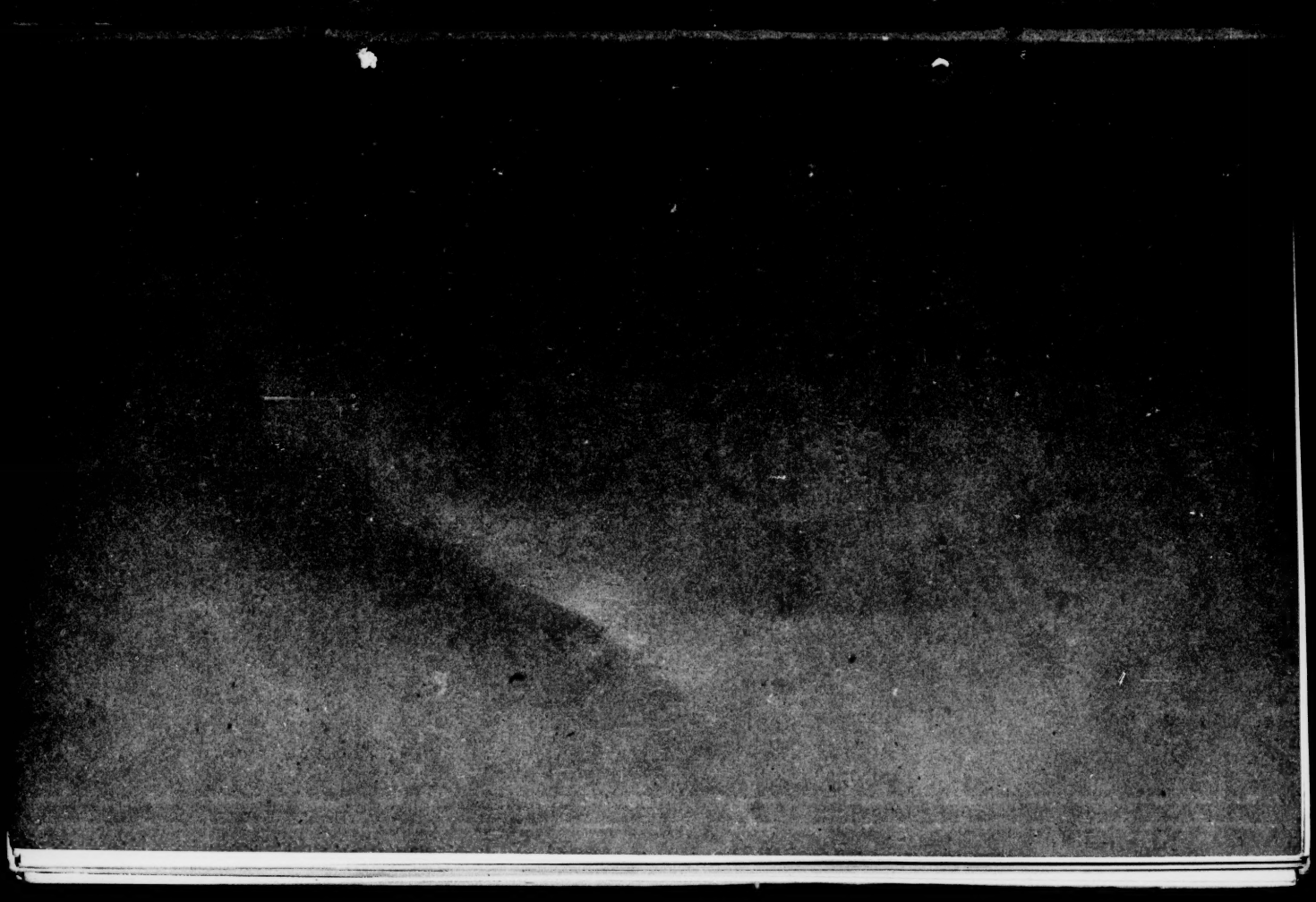
27 esq., proctor for defendants in error, by delivering a copy thereof to said Charles Tracy personally, and leaving the same with him, at the same time exhibiting to said Charles Tracy the above original.

STANLEY HUNTLEY.

Sworn to before me this 9 day of Oct., 1867.

R. E. STILWELL, *U. S. Com.*

Endorsed: U. S. Circuit Court. Francis O. J. Smith, pl'ff in error, agst. Sam'l F. B. Morse, def't in error. Citation. Filed Oct. 9, 1867.



SUPREME COURT OF THE UNITED STATES.

No. 250.

FRANCIS O. J. SMITH, PLAINTIFF IN ERROR,

vs.

SAMUEL F. B. MORSE ET AL., EXECUTORS OF ALFRED VAIL, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Clerk's certificate	1	1
Declaration	2	1
Pleas	10	5
Replication	14	6
Bill of exceptions	18	7
Assignment of errors	62	25
Joinder in error	64	26

1 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the writings annexed to this certificate are true copies of their respective originals on file and remaining of record in my office, & are the papers named in the stipulation between counsel for respective, hereunto attached, to be made part of the record in the Supreme Court of the United States under said stipulation.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 30 day of March, in the year of our Lord one thousand eight hundred and sixty-nine, and of the independence of the said United States the ninety-third.

[SEAL.] KENNETH G. WHITE, *Clerk.*

2 Circuit court of the United States for the southern district of New York.

SAMUEL F. B. MORSE and AMANDDA O. VAIL, as executrix, & Theodore Little & George Cobb, as executors of the last will & testament of Alfred Vail, deceased,
against
FRANCIS O. J. SMITH.

This is an action of covenant.
The pleadings are as follows:

Declaration.

In the circuit court of the United States for the southern district of New York, of the tenth day of February, A. D. 1864, in the term of October, A.D. 1863.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Samuel F. B. Morse, a citizen of the State of New York, & Amanda O. Vail, as executrix, & Theodore Little & George Cobb, as executors, of the last will & testament of Alfred Vail, deceased, citizens of the State of New Jersey, plaintiffs in this suit, by Tracy, Wait & Olmstead, their attorneys, complain of Francis O. J. Smith, a citizen of the State of Maine, defendant in this suit, being in custody, &c., of a plea of breach of covenant; for that,

3 Whereas the said plaintiff, Samuel F. B. Morse, now is a citizen of the State of New York, and the said plaintiffs, Vail, Little, & Cobb, now are citizens of the State of New Jersey, and the said Alfred Vail, at the time of his death, was a citizen of the State of New Jersey, and the said defendant now is a citizen of the

State of Maine; and whereas, heretofore, to wit, on the eighth day of October, one thousand and eight hundred and fifty-nine, to wit, at the city of New York, in the southern district of New York aforesaid, by a certain mutual agreement in writing, then and there made between the said plaintiffs, by the name and description of Samuel F. B. Morse, and the executors of Alfred Vail, deceased, of the one part, and the said defendant of the other part, which the said plaintiffs now bring into court here, sealed with the seal of the said plaintiffs, by Amos Kendall, their agent, and also sealed with the seal of said Kendall in his own right, and also sealed with the seal of the said defendant, the date whereof is the same day and year last aforesaid, it was recited in substance & effect, among other things, that a certain claim had been and was made by the said defendants against the said Morse and the said Alfred Vail, in his life-time, for stock and dividends in the Washington and New Orleans Telegraph Company, alleged to have been issued to the said Morse & Alfred Vail, or their assigns, which,
4 it was alleged, ought, by virtue of the contract for exchange of interest in the Boston, New York, & Washington & New Orleans lines of telegraph, between the said Morse & Alfred Vail & the said defendant, to have been issued to the said defendant, or his assigns other than the said Morse & Alfred Vail, together with all the dividends which might and have accrued thereon, alleged not to have been credited in a certain suit theretofore brought by the said Morse & Alfred Vail against the said defendant in the superior court of the city of New York; and also that certain claims had been and were made by the said plaintiffs to any stock in said company which might have been erroneously issued to the said defendant, or his assigns, which, in pursuance of the said contract of exchange, ought to have been issued to the said Morse and Alfred Vail in their own right, or to their assignees, together with all dividends which had accrued thereon.

And whereas, in and by the said mutual agreement in writing, it was mutually covenanted and agreed by and between the said plaintiffs of one part and the said defendant of the other part, that the said claims above mentioned should be referred to the final decision and arbitration of Thomas R. Walker & W. O. Olden, esquires, and one umpire of, if needful, who should adjudicate the same upon and according to facts that should be admitted or satisfactorily proved from the records of the said Washington & New Orleans
5 company, or other evidence satisfactory to said arbitrators, provided that if it should appear that any balance found due to either party under the contract aforesaid had been otherwise accounted for in whole or in part in any settlement that had taken place, the amount so accounted for should be set off against the amount so found due; and the said plaintiffs in fact say, that they, the said plaintiffs and the said defendant, afterwards, to wit, on the thirteenth day of December, one thousand eight hundred & fifty-nine, to wit, at the city of New York, in the said district, in pursuance of the said mutual agreement in writing and the covenants and

agreements aforesaid, did mutually appear before the said Walker and the said Olden, and did then and there place before them the said mutual agreement in writing, and did endorse thereon in their presence and subscribe a stipulation, binding themselves to abide and perform the award of said arbitrators without exception to or appeal from their decision; and also did present, refer, and submit to them, as such arbitrators, the several claims aforesaid, and did produce before & offer and gave to them, as such arbitrators, the respective proofs of them, the said plaintiffs, and of him, the said defendant, and then and from time to time there did present,
6 offer, & cause to be made before [before] them, as such arbitrators, arguments of the respective counsel of the said plaintiffs and the said defendant touching the said several claims; and that the said Walker and the said Olden took upon them the duty and office of arbitrators as aforesaid, and as such arbitrators fully heard the parties aforesaid, and carefully considered the matters so submitted to their decision, and they were unable to agree thereon; & that the said Walker & the said Olden, as such arbitrators, as aforesaid, after such full hearing, and a careful consideration of the matters so submitted to their decision, so being unable to agree thereon, to wit, on the fifteenth day of January, one thousand eight hundred and sixty-two, to wit, at the place in the district last aforesaid, in pursuance of the said mutual agreement in writing of the said plaintiffs and the said defendant, did duly appoint Abijah Mann, jr., esquire, to be the umpire provided for by the agreement and covenants aforesaid, whereof the said defendant afterwards, to wit, on the same day and year, & at the same place last aforesaid, had notice; and that the said Abijah Mann, junior, afterwards, to wit, on the same day and year, & at the same place last aforesaid, took upon him the duties of such umpire, & gave notice to the said parties, the said plaintiffs and the said defendant, that they might have the opportunity to be heard before him as such
7 umpire; and that the parties aforesaid, namely, the said plaintiffs and the said defendant, afterwards, to wit, on the twenty-ninth day of January, one thousand eight hundred and sixty-two, and from time to time thereafter, to wit, at the place in the district last aforesaid, in pursuance of the said mutual agreement in writing and the covenants and agreements aforesaid, did mutually appear before the said Abijah Mann, junior, and present, refer, and submit to him, as such umpire, their said several claims, and did produce before and offer and give to him, as such umpire, their respective proofs, and did present, offer, and cause to be made before him, as such umpire, the arguments of their respective counsel touching the said several claims; and that the said Abijah Mann, junior, as such umpire, and in pursuance of the premises, afterwards, to wit, on the twenty-second day of May, one thousand eight hundred and sixty-two, to wit, at the place in the district last aforesaid, made, subscribed, and published his final determination and award in writing, & whereby he, as such umpire, did determine and award that the

said Samuel F. B. Morse, and the executors of Alfred Vail, deceased, (the said plaintiffs meaning,) recover of the F. O. J. Smith (the said defendant meaning) seven thousand two hundred & fifteen dollars and seventy-three cents, to be payable in
8 stock of the Washington and New Orleans Telegraph Company, and three thousand four hundred and thirty-eight dollars and sixty-eight cents, payable in cash, of all which the said defendant then & there had notice; and that the said plaintiffs, afterwards and before the commencement of this suit, to wit, on the twenty-ninth day of May, one thousand eight hundred and sixty-two, to wit, at the place in the district last aforesaid, demanded and required of and from the said defendant the performance of the said award, and the making of the payments in stock and money therein mentioned as aforesaid, and the said plaintiffs then & there were ready and willing to accept and receive the said stock, and also then and there at all times hitherto to receive the said sum of money; yet the said defendant, knowing the premises, but disregarding his said covenants and agreements, has neglected and refused hitherto, & still neglects and refuses to perform the said award, or to make the payments aforesaid, or any part thereof; and the said stock of the Washington and New Orleans Telegraph Company, in the said award mentioned, at the time of the said making and publication of the said award, and of the making of said demand thereof, and thence, hitherto, has been of great value, and the said sum of seven thousand two hundred and fifteen dollars and seventy-three cents,
9 payable in said stock at the time when the same became payable as aforesaid, was and thence hitherto has been of great value, to wit, of the value of fifteen thousand dollars, whereof the said defendant then & there had notice; and that, by reason and by means of the premises, the plaintiffs lost the use, benefit, profits, and dividends of the said stock, and great gains which they might have realized from the sale thereof; and that the said stock has lost value and become depreciated in the market, since said default to deliver the same, to a large amount, and the plaintiffs thereby have suffered great damage, to wit, the sum of twenty thousand dollars; and the said plaintiffs bring into court here the letters testamentary of the last will and testament of the said Alfred Vail, deceased, whereby it appears that the said plaintiff, Amanda Vail, is the executrix, and the said Theodore Little & George Cobb are the excutors, of the last will & testament of the said Alfred Vail, deceased.

Wherefore, the said plaintiffs say that they have been and are injured by the aforesaid breach by the said defendant, so committed, of the said covenants & agreements, and have sustained damages thereby to twenty thousand dollars, and thereof they bring suit, &c.

TRACY & OLMSTEAD,
Pl'ffs' Att'ys, 18 *William st., N. Y.*

10 In the circuit court of the United States for the southern district of New York, of the , in the term .

SOUTHERN DISTRICT OF NEW YORK:

Samuel F. B. Morse, Amanda O. Vail, as executrix, & Theodore Little & George Cobb, as executors, of the last will and testament of Alfred Vail, deceased.

And now the said defendant, by himself and Richard H. Huntley, his attorney, comes and defends the wrong and injury, when, where, &c., and says that said mutual agreement in the plaintiffs' declaration set forth is not his deed; and of this the said defendant puts himself upon the country.

And, for a further plea in this behalf, the said defendant says that the said plaintiff ought not to have and maintain their aforesaid action thereof against him, because he says that said Amanda O. Vail, as executrix of said Alfred Vail, and said Theodore Little & George Cobb, as executors of said Alfred Vail, did not at any time make and enter into a mutual agreement in writing under seal with said defendant, as is alleged in the plaintiffs' declaration; and that at
11 the time of the alleged making of & entering into the supposed mutual agreement in the plaintiffs' declaration mentioned, the said executrix and executors of said Alfred Vail, deceased, had not been vested with legal or proper authority to make and enter into valid covenants by writing, obligatory and under seal, mutually with the defendant for and in behalf of said Alfred Vail, deceased, or of his estate, nor in their alleged capacities of executrix and executors of the said Alfred Vail, deceased, nor to authorize or empower any other person or agent so to do in their behalf, and never did so enter into or make such mutually valid writing by Amos Kendall, as is set forth in the plaintiffs' declaration aforesaid, and the said writing was and is wholly void in law; and this the defendant is ready to verify, and of this he puts himself upon the country.

And, for a further plea in this behalf made, the said defendant says that the said plaintiffs ought not to have and maintain their aforesaid action thereof against him, because he says, that the said Thomas R. Walker and H. O. Alden, in the plaintiffs' declaration mentioned, never did at any time make any award upon any
12 hearing before said arbitrators, had at any time between said plaintiffs and said defendant, and did not at the time and in the manner alleged in the plaintiffs' declaration duly appoint, in pursuance of the supposed mutual agreement in writing, mentioned in the plaintiffs' declaration, and then and there had no right or authority to appoint for said plaintiffs and said defendant Abijah Mann, junior, named in said declaration, to be the umpire provided for by the agreement and covenants in said declaration mentioned, upon the claims in said declaration mentioned; and because, he says further, that said Abijah Mann, junior, did not at the time mentioned n said declaration, nor at any time by any competent authority vested in him as umpire, pursuant to the supposed mutual agreement in

writing aforesaid, make, subscribe, declare, and publish any determination and award of and concerning the premises named in said supposed mutual agreement, nor that said plaintiffs, to wit, Samuel F. B. Morse, Amanda O. Vail, executrix of Alfred Vail, de-
13 ceased, Theodore Little, and George Cobb, executors of said Alfred Vail, deceased, recover of said defendant the sums of money and of telegraph stock named in said plaintiffs' declaration; and this said defendant is ready to verify.

Wherefore he prays that the plaintiffs ought not to have and maintain their aforesaid action thereof against him; and of this he puts himself upon the country.

FRANCIS O. I. SMITH,
Defend't, in person,
& RICHARD H. HUNTLEY,
His Attorney.

U. S. Circuit Court, southern district of New York.

SAMUEL F. B. MORSE *et al.*
vs.
FRANCIS O. I. SMITH.

And the said plaintiffs, by their attorneys aforesaid, as to the said plea of the said defendant by him first above pleaded, and whereof he has put himself upon the country, etc., do the like, etc.

And the said plaintiffs, as to the said plea of the said defendant by him secondly above pleaded, say that they, the said plaintiffs, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against him, the said defendant, because they say that the said Amanda O. Vail, as executrix of the said Alfred Vail, and the said Theodore Little and George Cobb, as executors of the said Alfred Vail, at the said time when, &c., in the said declaration mentioned, did make and enter into the mutual agreement in writing under seal with the said defendant, in the said declaration mentioned, in manner and form as therein alleged; and that the said ex-
15 ecutrix and executors of the said Alfred Vail, deceased, at the said time when, &c., had been and were vested with legal and proper authority to make and enter into valid covenants by writing, obligatory, and under seal mutually with the said defendant for and in behalf of the said Alfred Vail, deceased, and of his estate and in the alleged capacities of executrix and executors of the said Alfred Vail, deceased, and to authorize and empower any other person or agent so to do in their behalf; and, in fact, did so enter into and make such mutually valid writing by the said Amos Kendall, as is set forth in the said declaration, in manner and form as in the said declaration alleged; and that the said writing, at the time of the said making thereof, was and thence hitherto has been and still is valid and of force, without this that the said writing was or is void in law in manner and form, as in that plea alleged; and this they, the said

plaintiffs, pray may be inquired of by the country, &c., and the said defendant does the like, &c.

16 And the said plaintiffs, as to the said plea of the said defendant by him thirdly above pleaded, say that they, the said plaintiffs, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against him, the said defendant, because they say that the said Thomas R. Walker & H. O. Alden, in the said declaration mentioned, at the said time when, &c., upon a hearing had before them in manner and form as in the said declaration mentioned, at the said time when, &c., duly appointed in pursuance of the said mutual agreement in writing in the said declaration mentioned, and then and there had full right and authority to appoint for the said plaintiffs and the said defendant the said Abijah Mann, junior, in the said declaration mentioned, to be the umpire provided for by the said agreement and covenants in the said declaration mentioned, upon the said claims in the said declaration mentioned, in manner and form as therein alleged; and that the said Obijah Mann, junior, at the said time when, &c., in the said declaration mentioned, by competent authority vested in him as such umpire

17 pursuant to the said mutual agreement in writing, made, subscribed, declared, and published the said determination and award of and concerning the premises named in the said declaration, in manner and form as in the said declaration alleged; and that the said plaintiff recovered of the said defendant the said sum of money and of telegraph stock named in the said declaration, in manner and form as in the said declaration alleged; and this they, the said plaintiffs, pray may be inquired of by the country, &c., and the said defendant does the like, &c.

TRACY & OLMSTEAD,
Plaintiffs' Attorneys.
CHARLES TRACY,
Of Counsel.

18 The action came on for trial on the third day of November, 1865, before the Hon. Samuel Nelson, and a jury.

To support the action, the plaintiffs offered in evidence the writing, dated Oct. 8th, 1859, under seal and signed by Francis O. I. Smith, and by Amos Kendall for himself and as agent for Samuel F. B. Morse, and the executors of Alfred Vail, deceased, which writing the defendant admitted to have been signed by the parties according to its purport.

The defendants objected to the admission of said paper:

First. As not being competent evidence to support the plaintiffs' declaration of a covenant of submission; it being only a covenant of release of certain claims not to be submitted to arbitration, and referring to another agreement entered into by the parties, submitting to arbitration certain other claims not so released.

Second. Because upon its face it proves a departure of the plaint-

iffs' declaration from the covenants contained therein, in respect to the existence of such other articles of submission.

Third. Because its covenants are between this defendant and Amos Kendall as a party thereto, who is not a party to this action of the plaintiffs.

19 But the court overruled the defendant's objections, to which ruling the defendant duly excepted, and said writing was received in evidence.

The plaintiffs introduced, as a witness, Thomas R. Walker, esq., who, being duly sworn, testified as follows:

I was invited to act as an arbitrator between Samuel F. B. Morse and others, of the one part, and Francis O. I. Smith, of the other part. Hiram O. Alden and I met with that view. The paper already put in evidence was presented to us on that occasion. The memorandum at the foot of that paper was upon it when the paper was so presented to us. The agreement of Dec. 19, 1859, endorsed upon the same paper, was signed by me as subscribing witness. It is in the handwriting of Hiram O. Alden, he drew it up, Mr. Kendall & Mr. Smith signed, and I witnessed it.

The plaintiffs then offered in evidence said memorandum and said endorsed agreement. The defendant objected to the admissibility of said memorandum.

First. Because said writing was not under seal, but was a parol agreement multiplying the limitations of said original sealed agreement, and reducing the same from the covenant to a parol agreement.

20 Second. Because no authority of said Kendall to act for a deceased party without executors had been proved, and was not proveable.

And also objected to the admissibility of said endorsed agreement.

First. Because said writing was not under seal but was a parol agreement enlarging said original writing, and reducing the same from a covenant to a parol agreement, and is only admissible as proof in an action of asumpsit.

Second. Because the authority of said Kendall to sign the same for said Morse and for executors of Alfred Vail had not been proved.

The court overruled said several objections, and the defendant excepted to each such decision.

The sealed instrument, subjoined memorandum, and endorsed agreement were read in evidence, the same being as follows:

"Whereas in the suit of Samuel F. B. Morse and Alfred Vail (now deceased) against Francis O. I. Smith, commenced in the superior court of the city of New York, and pending on the appeal of said plaintiffs, said parties have agreed on an amicable settlement and reciprocal discharges and acquitances of the judgment rendered therein by said court and of all causes of action of either against the

21 other, and of all causes of action to this date of Amos Kendall against said Smith, either in his individual capacity, or as agent or attorney of said Morse & of said Vail, and of all causes of action to this date of said Smith against said Kendall either in his

individual capacity or as agent or attorney of said Morse or of said Vail, excepting as herein is specifically set forth.

"Now, therefore, be it known, to whom these presents shall come, that said parties have agreed to enter and caused to be entered a dismissal of said action upon the records of said court without the claim of costs by either party, and each party acquits and discharges the other forever, excepting as is hereinafter set forth, of all claims, bonds, contracts, promises, undertakings, and liabilities whatsoever to this date, as well as of all actions and causes of actions, to wit, the said Morse & Vail by the said Kendall, and Kendall each for himself and for the other, and the said Smith for himself; and to this end each of said parties contract and agree to sign and execute any other needfull acquittance and discharge the better to carry into effect said settlement that may be requested by either of the others; and to this end all stocks adjudged to be due from said Smith to said
22 Morse & Vail by the judgment of said court in said suit are to become and remain the sole and exclusive property of said Smith, with all the dividends that have or may accrue thereon; and to this end the requisite reconveyance is to be made to said Smith, and all the money so adjudged to be due from said Morse and Vail to said Smith is to become and remain the sole and exclusive property of said Morse and said Vail, or of his legal representatives. But the only exceptions in said mutual and reciprocal settlement by said parties and hereinbefore mentioned are limited and confined, now and forever, to the following claims of the said Smith against the said Morse & Vail, and said Kendall, as agent, and against said Morse individually, viz:

"1st. A claim for stock and dividends in the Washington & New Orleans Telegraph Company, alleged to have been issued to said Morse & Vail, or their assigns, which it is alleged, ought, by virtue of the contract for exchange of interests in the (Boston and New York and Washington and New Orleans) lines of telegraph, between said Morse & Vail and the said Smith, to have been issued
23 to said Smith, or his assigns, other than said Morse & Vail, together with all dividends which may have accrued thereon, alleged not to have been credited in said suit of Morse & Vail against said Smith, as provided in the articles of reference hereinafter mentioned; and the said Morse and the executors aforesaid in like manner reserve their claim to any stock in said company which may have been erroneously issued to said Smith, or his assigns, which, in pursuance of the contract of exchange aforesaid, ought to have been issued to said Morse & Vail, in their own right, or to their assigns, together will all dividends which have accrued thereon.

"2nd. A claim of said Smith against said Morse, on account of receipts in money or otherwise, for his invention of the telegraph from sources out of the United States, and for which said Smith claims said Morse to be accountable, under the contract of said Morse with said Smith, dated in March, 1838; and it is agreed between the said parties, that, in respect to the first of said claims, the same shall be referred to the final decision and arbitration of Thomas R.

24 Walker and H. O. Alden, esquires, and an umpire, if needfull, as provided in articles of submission this day executed, who shall adjudicate the same upon and according to facts that shall be admitted or satisfactorily proved from the records of said Washington & New Orleans company, or other evidence satisfactory to said arbitrators.

"Provided, that, if it shall appear that any balance found due to either party under the contract aforesaid has been otherwise accounted for, in whole or in part, in any settlement that has taken place, the amount so accounted for shall be set off against the amount so found due.

"In testimony of all which, said have hereunto signed their names and affixed their respective seals, at the city of New York, on this eighth day of October, A. D. one thousand eight hundred and fifty-nine, in duplicate.

[SEAL.] "FRANCIS O. I. SMITH.
[SEAL.] "AMOS KENDALL,
"*For himself, & as Agent for Samuel F. B. Morse*
"*& the Executors of Alfred Vail, deceased.*

"Witness—
"As to F. O. I. Smith, R. W. RUSSELL.
"As to A. Kendall, D. BROOKS.

25 "It is distinctly understood that all claims and counter-claims, originating from or pertaining to said Morse's invention out of the United States, are reserved on both sides.

"AMOS KENDALL,
"*For himself, and as Agent of Samuel F. B. Morse*
"*& the Executors of Alfred Vail, dec'd.*
"FRANCIS O. I. SMITH.

"We, the within-named parties, hereby agree and bind to abide and perform the award of the within-named arbitrators, without exception to or appeal from their decision.

"New York, Dec. 13, 1859.

"FRANCIS O. I. SMITH.
"AMOS KENDALL,
"*For himself, & as Agent for Samuel F. B. Morse*
"*and the Executors of Alfred Vail.*

"Witness—
"T. R. WALKER."

The plaintiffs produced to the witness certain original correspondence, and the witness testified that the same was laid before
26 the arbitrators, on the hearing of the arbitrators.

The defendant admitted such correspondence to be genuine, but objected to its admission as evidence:

First. Because it is not a witness under seal, constituting its terms of submission a covenant.

Second. Because it is anti-dated, and was no part of the agreement set forth in the declaration.

Third. Because it is not contained in the declaration.

The court overruled the objection, and the defendant excepted.

Said correspondence was then read in evidence, being as follows:

27 "NEW YORK, *Oct.*, 5*th*, 1859.

"To Peter Cooper, Esq., Prest.:

"In relation to Mr. Smith's contested claim to stock in the Washington & New Orleans Telegraph Company, I make the following proposal, viz: For four thousand dollars secured to me, I will hold Mess. Morse & Vail and all other parties harmless against any claim set up by the Hon. F. O. I. Smith for additional stock in the Washington and New Orleans, growing out of the contract for exchange of interests in the (Boston and New York and Washington and New Orleans) lines of telegraph.

"The issue of stock to Messrs. Morse and Vail and myself, on account of exchange of interest, shall be readjusted from the basis of miles as provided in the original contract.

"Any other claims shall be adjusted upon principles of law and equity. Any balance found due to Mr. Smith on the one hand, or to Morse & Vail on the other, shall be payable in the stock of the company.

"I will submit the case absolutely to Messrs. Alden & Walker, with an umpire appointed by them if they do not agree, to be
28 decided within 60 days.

"This proposal is made upon the indispensible condition, that Mr. Smith shall acquit Messrs. Morse, Vail, executors, and myself, of all other claims in any way connected with Morse's telegraph in the United States from receiving a similar acquittance in return.

"AMOS KENDALL.

"Strike out the paragraph 'any other claims shall be adjusted upon principles of law and equity;' and so that mutual releases proposed shall cut any other claim on either side in the United States.

"Let the Ohio and Mississippi stock, already conveyed by me to M. & V. in part satisfaction of court's decree, be reconveyed. The same has not been accepted by them.

"Let any bal. of W. & N. O. stock found due be payable in stock, & dividends received in money be refunded in money, and the proposal will be at once acceded to.

FRANCIS O. I. SMITH.

OCT. 5, '5 .

"I assent to the modification proposed by Mr. Smith.

"AMOS KENDALL."

29 The witness further testified as follows:

The parties appeared before us, and proceeded with the arbitration. Both sides appeared; Mr. Smith appeared in person, Mr.

Kendall represented the other parties. We heard the whole of what they had to submit. Mr. Alden and I did not come to an agreement on the matters submitted ; we disagreed in our findings. The appointment of an umpire, now produced, was signed by Mr. Alden and me.

The plaintiffs offered such appointment in evidence. The defendant objected to its admissibility ; but the court over-ruled the objection, and the defendants excepted.

The appointment was read in evidence, being as follows :

"Before Thomas R. Walker & H. O. Alden, arbitrators.

"SAMUEL F. B. MORSE *et al.*
"*vs.*
"FRANCIS O. I. SMITH.

"NEW YORK, *Feb'y* 15, 1862.

"And now the said arbitrators, after a full hearing of the parties, and a carefull consideration of the matters submitted to their decision, being unable to agree thereon, do hereby appoint Abijah Mann, esq., of Brooklyn, New York, to be the umpire provided for in the
30 articles of submission ; and it is agreed that [that] he shall duly notify said parties, that they may have the opportunity to be heard before him.

"T. R. WALKER,
"H. O. ALDEN,
"*Arbitrators.*"

Witness. There was no instrument or articles of submission before the arbitrators, except the said sealed instrument, subjoined memorandum, endorsed agreement of December 13, 1859, and the said correspondence. Both parties were before us, and these several documents were received from them.

The plaintiffs then offered in evidence the written and sole award of said Abijah Mann, junior, as umpire, the authenticity of which was admitted by the defendant, but was objected to by the defendant as inadmissible.

First. Because said Mann was not duly and authentically appointed umpire by the said Walker & Alden.

Second. That if otherwise, the hearing and award were only authorized according to the submission already put in evidence, be made by the joint action of the three arbitrators with the concurrence of them.

Third. That the award was defective and invalid and founden in mistakes apparent on the face of it, and did not embrace the
31 subject-matters submitted for decision by the items of the written proofs already in the case.

But the court admitted the writing, to which the defendant duly excepted.

And it is as follows:

"On the eighth of October, 1859, there was an adjustment between F. O. I. Smith, of the one part, and S. F. B. Morse, Amos

Kendall, and the executors of Alfred Vail, on the other part, embracing all claims, suits, and disputes; and mutual acquitances were executed by 'which each party acquits and discharges the other forever, except as herein set forth, of all claims, bonds, contracts, promises, undertakings, and liabilities whatsoever to this date, as well as of all actions and causes of actions,' &c.

"There are two exceptions to this general acquittance, one of which is as follows, viz:

"'A claim for stock and dividends in the Washington and New Orleans Telegraph Company alleged to have been issued to said Morse and Vail or their assigns, which, it is alleged, ought, by virtue of the contract for exchange of interests in the Boston and New York, and Washington and New Orleans lines of telegraph, between said Morse and Vail, and said Smith, to have been issued to said Smith or his assigns other than said Morse and Vail, together with
32 all dividends which may have accrued thereon, alledged not to have been credited in said suit of Morse and Vail against said Smith as provided in the articles of reference hereinafter mentioned; and the said Morse and the executors aforesaid in like manner reserve their claim to any stock in said company which may have been erroneously issued to said Smith or his assigns, which, in pursuance of the contract of exchange aforesaid, ought to have been issued to said Morse and Vail in their own right or to their assigns, together will all dividends which have accrued thereon.'

"The second exception has no reference to the matter involved in this arbitration.

"The instrument then refers to the articles of submission that day executed, and states that it is agreed between said parties, that in respect to the first of said claims the same shall be referred to the final decision and arbitration of Thomas R. Walker and H. O. Alden, esqs., and an umpire if needfull, as provided in articles of submission this day executed, who 'shall adjudicate the same upon and according to such facts as shall be admitted or satisfactorily proved from the records of the Washington and New Orleans Company, or other evidence satisfactory to said arbitrators.'

33 "The articles of submission contain a provision 'that the issue of stock to Messrs. Morse and Vail and myself on account of exchange of interests shall be readjusted upon the basis of miles, as provided in the original contract; any balance of Washington and New Orleans stock found due be payable in stock, and dividends received in money be refunded in money.'

"The submission was to the arbitrament of Messrs. Alden and Walker, with an umpire appointed by them if they do not agree.

"The said arbitrators, Thomas R. Walker and H. O. Alden, thus agreed upon by the parties, after the hearing of the case as presented by the said parties, failed to agree on an award or decision and elected the subscriber as an umpire pursuant to the agreement and articles of submission hereinbefore referred to.

"It appears that in April, 1847, the said Samuel F. B. Morse and Alfred Vail were the owners of three-fourth parts, undivided, of the

patent interests in a line of telegraph then constructed between the cities of Boston and New York, and they also owned a similar patent interest in a line of telegraph then about to be built between the cities of Washington and New Orleans.

34 "It also appears that F. O. I. Smith owned the remaining one-fourth part of the patent interest in both of said lines.

"At this time contracts were made and executed by and between said Morse and Vail, on the one side, and the said Smith, on the other, for an exchange of the interests aforesaid to a certain extent, that is to say; said Morse and Vail transferred their three-fourths patent interest in the Boston and New York line already built, and being 215 miles in length, to said Smith, who, in consideration thereof, transferred and conveyed as follows, viz: 'all his right, title, and interest in a portion of the aforesaid line of telegraph from Washington to New Orleans, bearing the proportion to the whole line, as it may hereafter be built, that six hundred and forty-five miles bear to eleven hundred and seventy-two miles, the distance by the post office route between Washington City and New Orleans; five-sixths [sixths] of the interest hereby conveyed being for the use and benefit of the said Morse, and one-sixth being for the use and benefit of the said Vail; to have and to hold to the said Morse and Vail in the proportions aforesaid, their heirs, administrators, and assigns, with all the profits to be made therefrom, and all the stock to

35 be issued thereupon, and all the appurtenances and benefits thereto belonging forever.'

"The above description of the interest assigned by said Smith in the instrument of conveyance is proceeded in said conveyance by the following language, viz:

"'Know all men by these presents, that I, Francis O. I. Smith, proprietor of one-fourth part of Morse's patents for an electro-magnetic telegraph on the main line of communication from Washington city through the States of Virginia, North Carolina, South Carolina, Georgia, Alabama, Louisiana, and, if need be, Mississippi, to the city of New Orleans, for and in consideration of the conveyance this day made to me, my heirs, administrators, and assigns, by Samuel F. B. Morse and Alfred Vail of the interest held by them in the line of telegraph built by the New York and Boston Magnetic Telegraph Company, and of one dollar in hand paid, the receipt whereof I hereby acknowledge, do bargain, sell, and convey to the said Morse,' &c., and then follows the above recited description of the interest conveyed.

"It appears that for the purpose of the exchange of interests mentioned in the contract, the post office distances for the two

36 lines were assumed, although neither line was, nor was expected to be, confined to the mail routes; and as the Washington and New Orleans line was not built or located the post office distances presented the best criterion then available for measuring the relative value of the two lines. It appears that the post office distance from New York to Boston was 215 miles, and that from Washington to New Orleans, 1,172 miles. It appears that the length of the main line of the Washington and New Orleans telegraph line was, in fact,

1,434 miles, which is the true distance travelled by telegraph messages on the main line between these two points.

"Under the state of facts presented by the respective parties the question arises, what was the extent of interest in the main line of the Washington and New Orleans line of telegraph transferred or conveyed by F. O. I. Smith to Morse and Vail by the conveyance hereinbefore referred to?

"It appears to me that there is no sufficient reason offered for departing from the plain language of the contract, by which F. O. I. Smith conveyed to Morse and Vail all his right, title, and in-
37 terest in the main line of telegraph from Washington to New Orleans, 'bearing the proportion to the whole line, as it may hereafter be built, that six hundred and forty-five miles bears to eleven hundred and seventy-two miles, the distance by the post office route between Washington city and New Orleans.'

"The post routes of the two lines, namely, that between New York and Boston, and that between Washington city and New Orleans, was assumed for the purpose of adjusting the relative value of the interests conveyed by the parties in the two lines; and whether those post routes resulted in being less or greater in length than the real distance of the two respective lines, so far as the contract was concerned, it would make no difference. Neither line was in fact or expected to be confined in its construction to the post routes; thus indicating that the assumption of the post routes was resorted to for the purpose of approximating the relative value of the interests conveyed in those lines, and to arrive at a proportion in the conveyance by Smith to Morse and Vail of an interest in the Washington and New Orleans line, which was less than his whole interest in that line, the length of which line was certainly to be greater than the
38 number of miles to which the assigned interest was to be confined by the contract.

"Dividing the line of 1,434 miles, therefore, according to the proportion in the contract, it appears that the whole patent right on 789 miles of the main line of the Washington and New Orleans line of telegraph belongs to Messrs. Morse and Vail by the adition of their former interest of three-fourths of the one quarter interest of F. O. I. Smith assigned by him to them in that extent of the line, leaving 645 miles, on which Mr. Smith retained his one-fourth.

"It appears that on the first wire the patent stock originally issued on 645 miles, on which Mr. Smith retained his one-fourth interest, amounted, at $150 per mile, to $96,750.

Mr. Smith, one-fourth of this, owes		$24,187 50
There was issued directly to himself	$7,500	
There was issued to Morse & Vail, as his assigns, in part payment for the Buffalo & Milwaukee line	$22,239 30	
		29,739 30
Mr. Smith was thus overpaid		$5,551 80.

"Consequently Messrs. Morse & Vail received $5,551 80 less than the amount of stock which accrued on their 789 miles of
39 main line, and that amount was wrongfully issued to Mr. Smith, and which the latter is bound to refund in stock, together with all dividends which have been declared and paid thereon to be refunded in money.

"It appears that there was a second wire put up since the first issue of stock, on the line from Petersburgh through Wilmington, North Carolina, to Kingsville, S. C., and from Columbia, S. C., through Branchville, Augusta, Georgia, and Millen to Macon, and also from Mobile to New Orleans. Upon these wires there have been two issues of patent stock, the first amounting to $35,799 80, and the second to $5,932.

"The latter was entirely on Morse and Vail's section, being the second wire from Wilmington to Kingville, and the entire stock should have accrued to them in their own right. The former issue was upon the second wire from Petersburg, Va., to Wilmington, N. C., and from Columbia, S. C., through Branchville, Augusta, & Millen to Macon, Ga., and from Mobile to New Orleans. All this stock also belonged to Messrs. Morse & Vail, except that accruing from the second wire between Mobile and New Orleans, about 192 miles, and on or about 36 miles north of Macon, in which Smith retained
40 his one-fourth interest, according to the exchange contract.

The whole amount issued is	$41,731 85
Of this there has been issued to Morse & Vail, under Mr. Smith's assignment, on account of purchase of patent right on the Buffalo and Milwaukie line	4,688 71
Leaving Morse & Vail in their own right	$37,043 14

"This including their original interest and that acquired by Mr. Smith's transfer.

"It appears that by the report of the president to the stockholders of the Washington and New Orleans Telegraph Company, made in July, 1851, that with the view of carrying into effect a resolution of the company directing a second wire to be put up between Mobile and New Orleans, that he had examined that section of the line and found that the whole of it had to be renewed, the original poles being almost entirely rotten. He, therefore, determined, he says, to include the renewal of the old line and the second wire in the same contract, and he accordingly made a contract with Mr. Griffin to complete the work for $10,500, including an additional number of poles.

"The patent stock to be issued was to be equal to the cost of the second wires.

41 "It appears that the whole amount of the $10,500, above mentioned, paid under Griffin's contract was charged to the second wire account.

"Of the stock issued upon this $10,500, $2,625 belonged to Mr.

Smith or his assigns. The cost of the second wire on the 36 miles north of Macon can be ascertained by deducting the $10,500, arising under the Griffin contract, above referred to, on the Mobile and New Orleans section; thence we have $31,231 85 as the cost of the second wire on the lines between Petersburgh, Va., & Macon, Ga. It appears that the whole distance was 703 miles. It will give to 36 miles $1,599 12, of which Mr. Smith's one quarter is $399 78. This added to the $2,625, accruing from the New Orleans & Mobile line, makes $3,024 78, which was the whole amount accruing to Mr. Smith from the second wire on an adjustment of the accounts upon the basis of miles according to the exchange contract and the terms of submission.

"But there was issued on Mr. Smith's assignment an account of purchase of the patent right on the Buffalo and Milwaukie line—

The sum of	$4,688 71
Deduct the amount actually due	3,024 78
Smith was overpaid on second wire	1,663 93
Overpaid on the first wire	5,551 80
	$7,215 73

"It appears there were—

Dividends on stock from first wire	$1,832 04
Also on second wire	99 89
Dividend in 1859	166 55
Dividend, January 1, 1860	216 50
	$2,314 98
Interest on dividends to January, 1860	526 12
Interest on dividends from January 1, 1860, to May 22, 1862	332 54
	$3,223 64
Dividend on $2,215 73, at 3 per cent., payable July, 1860, and interest, at 6 per cent., from August 1, 1860, to May 22, 1862	73 67
Dividend on same amount, payable 1,'61, and interest from Feb. 1, 1861	71 68
Dividend on same, payable August 1, 1861, and interest.	69 69
	$3,438 68

"I, therefore, as umpire, do finally determine and award that the said Samuel F. B. Morse and , the executors of Alfred Vail, deceased, do recover of said F. O. I. Smith, seven
43 thousand two hundred & fifteen dollars and seventy-three cents, to be payable in stock of the Washington and New

Orleans Telegraph Company, and three thousand four hundred and thirty-eight dollars and sixty-eight cents, payable in cash.

"New York, May 22, 1862. Duplicate.

"A. MANN, JR., *Umpire.*

"Witnesses: JAMES TAYLOR."

The plaintiffs then offered a copy of the will and testament of Alfred Vail, duly authenticated, to prove the appointment of the executors of said Vail named in the plaintiffs' declaration, with certificate of oaths of said executors, dated Feb. 4, 1859, to which defendant objected as incompetent in this action, but the court received the evidence, to which the defendant duly excepted.

And it is as follows:

44 'In the name of God. Amen.

"I, Alfred Vail, of Morristown, Morris county, New Jersey, being of sound and disposing mind, memory, and understanding, but weak in body, do make and publish this my last will and testament in manner following:

"I request and direct that my body be buried by the side of the grave of my former deceased wife in the burying ground of St. Peter's church, Morristown, and that a modest monument be erected at my grave.

"I also order and direct that all my just debts and funeral expenses be paid as soon after my decease as practicable.

"I also will, order, and direct, that my wife Amanda O. Vail, be permitted to take, have, hold, and keep as her own and absolutely, all the property which she brought to me at and since our marriage; all the property which may have accrued to her in her own right before or since her marriage with me; and all the pieces of property, including table silverware, which I have presented to her since our marriage.

"After excepting the specific bequests hereinafter expressed,

45 I give, devise, and bequeath all of my property, real and personal and mixed, to George T. Cobb and Theodore Little, esqs., and their heirs, and to the survivor of them, and the heirs of the survivor of them, as joint tenants, and not as tenants in common, in trust, nevertheless, for the following uses and purposes, and for no other uses and purposes whatever, namely: to permit my said wife, Amanda O., and my children, so long as the latter remain unmarried and my wife remains my widow, and until my youngest son, George, attains the age of twenty-one years, to use and occupy and enjoy my house and lot where I now live in South street, Morristown, and the furniture and fixtures therein, as a home for her and my children.

"Any other real estate I may own is to be sold, and the proceeds invested, and the residue of my estate is to be invested, as my said trustees shall think judicious, and until my youngest son attains the age of twenty-one years, or dies, if my said wife shall so long remain unmarried, my said trustees and the survivor of them, is and are to pay the income of my estate, but not more than three thousand dollars

per annum, yearly, and every year, to my said wife, to keep
46 in order and repair, and to support the said house above left for her and my children, and to maintain her, and such of my children as are under twenty-one years of age, and need support, and to give my son George a literal christian education. And when my said son George shall attain twenty-one years of age, or die, or my said wife Amanda shall die, or marry, whichever of said events shall first happen, my said trustees, or the survivor of them, if my said wife be dead or married, shall sell and convey, or if she be living and unmarried, they may, with her consent, sell and convey my said house and lot, and convert my whole estate into money, or what can be used as money, and to divide and dispose of the same as follows:

"If my said wife be then living and unmarried, and my said house and lot be unsold and she occupies it and uses it and the furniture, then to pay her yearly and every year while she lives unmarried, and uses and occupies said house and furniture, the sum of six hundred and twenty-five dollars; but if said house and furniture be sold, then from the sale thereof, to pay her yearly and every year,
so long as she shall live and remain unmarried, the sum of
47 twelve hundred and fifty dollars; but at her marriage all her right and interest in my estate shall cease.

"My whole estate, subject to the foregoing provisions in favor of my wife, is to be divided equally among my children, one-third to each one of them, viz: Stephen, James Cummings, and George, in case my father shall not give any more by will or otherwise of his estate to my son Stephen than he does to my other two sons; but in case my father shall give more of his estate, to my son Stephen than he does to my other sons, then I direct that my estate, subject to the provisions herein before made for my wife, be divided into four equal parts, and one quarter thereof be paid or delivered to my son Stephen, and that the other three quarters be divided equally between my other two sons.

"In case any of my said sons shall die leaving a child or children, him surviving before division is to be made as aforesaid, the child or children shall take and have the parent's share.

"In case before my said son George shall attain twenty-one or die,
my wife being alive and unmarried, it shall appear to my said
48 trustees or the survivor of them, that the income of my estate is inadequate to keep up my homestead establishment and to maintain my wife and children and educate my son George as hereinbefore directed, then, my said trustees or the survivor of them, with the consent of my wife, may rent out said house and premises and apply the rent as my other estate is hereinbefore directed to be applied.

"In addition to what I have hereinbefore provided for my wife, I give and bequeath to her for so long as she lives and remains unmarried and my widow, the interest which shall be paid upon a bond and mortgage for three thousand dollars, made and given to me by William L. Hennason & others, and my wish and directions are that

said Hennason be not urged or required to pay the principal of said mortgage so long as my wife shall live and remain my widow, unless my executors shall deem it unsafe to forbear demanding said principal.

"As to the custody of my son George, my will is that if Mrs. Nathaniel T. Rochester desires to take and adopt him as her
49 own son, and to keep him until he is twenty-one years of age, she may do so, provided Mrs. Rochester does not reside in the city of Rochester, New York, and my beloved wife, Amanda, shall give her consent, but if my said wife shall not give her consent that Mrs. Rochester shall take and adopt George, and she desires to keep him herself, she may have the custody and care of him, subject to the supervision of my said trustees and the survivor of them, who are to be consulted as to his education and bringing up.

"I am associated with Mr. William C. Baker and John Hone and some others, in an obligation merely verbal, the particulars of which are known by Messrs. Baker & Hone, to make certain payments, or see that they are made, to the Rev'd Mr. Cornell; I desire and direct my executors to do what I engaged to do in that respect.

"I give and bequeath unto my son Stephen for his own use my gold watch and my lathe with all the files and turning tools hanging in the racks in my workshop, also the castor which belonged to his mother and formerly to his mother's father, and also all of my mechanical works and tools, except what is hereinafter given to
50 Professor Morse and my son James Cummings; I give and bequeath to my son James Cummings for his own use my cabinet work bench and all the tools for working wood, bottles of varnish, and the silver tongs which belonged to his mother.

"When my family shall break up housekeeping, I direct that my books be not sold, but divided equally between my three sons, including the Coast Survey maps.

"The cases and shelves of minerals I now have I give and bequeath to my wife for her own use absolute forever; also all the engravings in my house now framed and hanging up, but not the others.

"I give and bequeath all my telegraphic apparatus in the cases in my hall, excepting the steel roller with three groves and brass lever with three points to fit in the groves, to Professor S. T. B. Morse, with a request that he will present them to the New Jersey Historical Society.

"I give and bequeath to Dr. William D. H. Quimby my microscopic apparatus and everything appertaining or relating thereto for his own forever.

51 "I give and bequeath my magic lantern, stereoscope and fixtures, and camera obscura to my son James Cummings; my telescope I give and bequeath to my son George for his own use forever.

"I give and bequeath to my nephew Isaac A. Canfield, to his wife Mary, to my niece Sarah L. Quimby, to my nieces Harriet V. B. Cutter, Jane Cutter, Celia Cutter, Fannie G. Vail, Louisa Vail,

to my nephew Augustus Cutter, and to my wife's sister Julia Eno, and my sister Sarah Hurd, each the sum of twenty-five dollars, making two hundred and seventy-five dollars, to be equally divided between them, the eleven persons last named, as [as] a keepsake to each one of them.

"I hereby appoint George T. Cobb and Theodore Little executors, and my beloved wife, Amanda O., executrix, of this my last will and testament.

"In witness whereof, I have hereto set my hand and seal January the fifteenth, eighteen hundred and fifty-nine.

[SEAL.] "ALFRED VAIL.

"Signed, sealed, published, and declared by the said Alfred Vail to be his last will and testament, in the presence of us, who,
52 at his request, in his presence, and in the presence of each other, have hereunto set our names as witnesses, 15 January, 1859.

"NOTE.—The words 'Mrs. Rochester does not reside in the city of Rochester, New York,' and interlined in 3rd line from top of 5th page, the words 'and tongs,' in 10th line from bottom of 5th page, erased, the words 'my sister,' in the 6th line from bottom of 6th page interlined the words 'including Coast Survey maps' between 2 & 3 lines from top of 6th page, & the words 'now framed and hanging up, but not the others,' written between 5 & 6 lines from top of 6th page, all done before execution.

"HENRY VAN ARSDALE,
"*Morristown, N. J.*
"JACOB VANALTA,
"*Morristown, N. J.*

"MORRIS COUNTY, *ss:*

"Henry Van Arsdale, one of the witnesses to the annexed will, being duly sworn did depose and say that he saw Alfred Vail, the testator therein named, sign and seal the same, and heard him pronounce, publish, and declare it to be his last will and testament, and at the doing thereof the said testator was of sound and depos-
53 ing mind and memory, as far as this deponent knows and as he verily believes, and that Jacob Vanalta, the other subscribing evidence, was present at the same time and signed his name as a witness to the said will together with this deponent, in the presence of the said testator.

"HENRY VAN ARSDALE.

"Sworn before me, February 4th, 1859.
"FRED. DELLICKER, *Surrogate.*

"MORRIS COUNTY, *ss:*

"George T. Cobb, Theodore Little, and Amanda O. Vail, the executors in the annexed will named, being duly sworn, did severally depose and say, that the annexed writing contains the true last will

and testament of Alfred Vail, the testator therein named, so far as they know, and as they verily believe, and that they will well and truly perform the same by paying first the debts of the said deceased, and then the legacies in said testament specified, so far as the goods and chattels, rights and credits of said deceased can thereunto extend, and that they will make and exhibit unto the surrogate's
54 office of the county of Morris, a true and perfect inventory of all and singular the goods, chattels, and credits of said deceased that have or shall come to their knowledge or possession, or to the posession of any other person or persons for their use, and render a just and true account when thereunto lawfully required.

"G. T. COBB.
"THE. LITTLE.
"AMANDA O. VAIL.

"Sworn before me, February 4th, 1859.
"FRED. DELLI KER, *Surrogate.*

"I, Frederick Dellicker, surrogate of the county of Morris, do certify the annexed to be a true copy of the last will and testament of Alfred Vail, late of the county of Morris, deceased, and that George T. Cobb, Theodore Little, & Amanda O. Vail, the executors therein named, proved the same before me, and are duly authorized to take upon themselves the administration of the estate of the testator, agreeably to the said will.

"Witness my hand and seal of office the fourth day of February, in the year of our Lord one thousand eight hundred & fifty-nine.

[SURROGATE'S SEAL.] "FREDERIC K DELLICKER.

55 "STATE OF NEW JERSEY, *Morris County, ss:*

"Joseph W. Ballentine, surrogate of the county of Morris, in the State of New Jersey, do hereby certify that the annexed writing is a true copy of the last will and testament of Alfred Vail, late of said county, deceased, of the proofs and of the letters testamentary issued and granted thereon, as taken from and compared with the record in my office.

"Witness my hand and seal of office this twenty-eighth day of February, in the year of our Lord one thousand eight hundred & sixty-five.

[SEAL.] "JOSEPH W. BALLENTINE.

[U. S. i. r. stamp, 5 c., cancelled.]

"STATE OF NEW JERSEY:

"I, Whitfield S. Johnson, secretary of the State of New Jersey, do hereby certify that Joseph W. Ballentine, esquire, whose certificate is annexed to the writing hereto appended, was, at the time of the doing thereof, surrogate in and for the county of Morris, in said State, duly commissioned and sworn; that full faith and credit are to be given to his official attestations, and that the signature thereto is in

56 the proper handwriting of the said Joseph W. Ballentine, and that he is the lawfull custodian of said record.

"In testimony whereof I have hereunto set my hand and affixed my seal of office, at Trenton, in said State, this twenty-third day of March, A. D. one thousand eight hundred & sixty-five.

[SEAL OF THE SECRETARY OF STATE.] "W. JOHNSON.

[U. S. i. r. stamp, 5 c., cancelled.]

57 Amos Kendall, a witness for the plaintiff, being sworn, testified as follows:

I appeared for Morse and his associates before the arbitrators, and afterwards before Mr. Mann, the umpire; Mr. Smith also appeared before them and also before the umpire. The parties on both sides submitted to the umpire the same arguments which had been presented to the arbitrators, and some oral arguments also; after the award of the umpire was published, I called on Mr. Smith to pay the money and deliver the stock as awarded.

There were no writings or documents of the character of articles of submission between the parties other than the sealed instrument, subjoined memorandum, endorsed agreement, and correspondence already in evidence.

Mr. Morse is a citizen of the State of New York, resides at Poughkeepsie, New York, part of the year, and in the city of New York the residue of the year.

The executors of Vail are citizens of New Jersey, residing in that State. Mr. Vail, the testator, also was a citizen of New Jersey, and resided in that State. Mr. Smith is a citizen of the State of Maine.

58 The stock mentioned in the award can hardly be said to have any market value, for the lines have been in the possession of the rebellious States during the late war, & remain now in the possession of the government of the United States. The lines were under lease when the war broke out, at a rent of six per cent. on the capital of the company. After the rebellion broke out a compromise was effected by which the stockholders agreed to take half that rate during the war. Since that time the dividends have been three per cent. per annum. Henceforward they are expected to be six per cent., under the terms of the lease. This stock has not been a subject of public sale. I know of no transfer during the war, or subsequently. I hold a pretty large amount of it. I consider it worth in cash $80 on the $100. It is leased out at six per cent., and the rent is guaranteed at that. I give $80 per cent. as its present value. In May, 1862, when the award was pronounced, the stock was worth 30 per cent. The dividends realized on this stock, since the award, 3½ years, on $7,215 53, amount to $754 64. I have

59 computed the amount of this stock at 80 per cent.; it is $5,773 58; the interest on the dividends averaged, at 1¾ year, is $29 55; the interest on the cash awarded, $3,438 68, is $713 52. Making the total statement thus:

Stock, $7,215 73, at 80 per cent	$5,773 58
Dividends	757 64
Interest on dividends	79 55
Cash awarded	5,438 68
Interest on cash awarded	713 52
Total	10,762 97

The plaintiff here rested.

Thomas R. Walker, the above witness, was then cross-examined by the defendant, & testified as follows :

A printed book such as is now shown me by the defendant, was before the arbitrators. It is a copy of the agreement of Mr. Kendall containing copies of instruments. I do not remember whether the original of all the instruments contained in the book were before us, but I have no doubt they were. I suppose the originals all went to Mr. Mann.

The defendant offered to prove that a contract between Morse & Vail, of one part, and Smith, of the other part, existing in counterpart, signed by the attornies of the respective parties, bearing
60 date April 8, 1847, and also the contract E, copies of which are in said printed book, were not considered by the arbitrators, nor by the umpire; also that the same were the contracts referred to in the instrument of Oct. 8, 1859.

The court excluded such proposed evidence, and the defendant's counsel excepted.

Witness. There were no other articles of submission than those which have been put in evidence here. Mr. Alden and I were present before the umpire.

The evidence on both sides was then closed.

The court thereupon directed the jury to return a verdict for said sum of $10,762 97, which was accordingly so returned.

To which direction the defendant duly excepted.

All the exceptions in the bill of exceptions were taken during the trial of this cause.

Given under my hand and seal this day of 186 .

S. NELSON.

Let the clerk certify this bill of exception as part of the record in this case.

Dec'r 3d, 1868.

S. NELSON.

Indorsed.

Circ't c't U. S., S. D. N. Y. Samuel S. B. Morse et al. *vs.* Francis O. I. Smith. Copy case.

Mr. Huntley will see Mr. Tracy, and see this is in form.

S. N.

Please take notice that the within is a copy of the case on appeal in this action.

Dated Nov. 16th, 1866. Yours, &c.,

RICHARD H. HUNTLEY,
Att'y for Def't.

Filed. Tracy & Olmstead, att'ys for pl'ffs. Rec'd Nov. 16, 1866.

61

62 *Complaint.*

To the honorable justices of the Supreme Judicial Court of the United States:

Complains Francis O. J. Smith, a citizen of the State of Maine and of the United States, that on the record, process, and proceedings of a suit wherein Samuel F. B. Morse, a citizen of the State of New York, and Amanda O. Vail, as executrix, and Theodore Little and George Cobb, as executors of the last will and testament of Alfred Vail, deceased, citizens of the State of New Jersey, and all citizens of the United States, were plaintiffs, and the said Francis O. J. Smith was defendant, in the circuit court of the United States which was begun and holden at the city of New York, within and for the southern district of New York, on the third day of November, in the term of October, one thousand eight hundred and sixty-five, whereof an authenticated transcript shall be produced in the Supreme Judicial Court of the United States next to be holden at Washington, on the first Monday of December, A. D. the year of our Lord one thousand eight hundred and sixty-seven, the manifest errors have intervened, that is to say:

First. In the rulings of the said circuit court upon the evidence offered by the plaintiffs and objections thereto by the defendant, as appears in the report of the case made a part of this complaint and marked A and appended hereto.

63 Second. In the rulings of the said circuit court upon the evidence offered by the defendant and the rejection of the same, as appears in the report of the case made a part of this complaint and marked A, as aforesaid.

Wherefore the said Francis O. J. Smith prays the consideration of the said Supreme Court of the United States, and that the judgment aforesaid, and every part thereof, may be reversed.

FRANCIS O. J. SMITH,
Pro., &c.

R. H. HUNTLEY,
Def t's Counsel.

This complaint or assignment of errors may be filed nunc pro tunc, as of the date of the writ of error.

64 Supreme Court of the United States.

SAMUEL F. B. MORSE *et al.*
adsm.
FRANCIS O. J. SMITH.

And the said Samuel F. B. Morse, and the said Amanda O. Vail executrix, and Theodore Little and George Cobb, executors, of the last will and testament of Alfred Vail, deceased, by Tracy & Olmstead, their attorneys, freely come into court here and say that there is no error, either in the record and proceedings aforesaid or in the giving of judgment aforesaid, nor hath any error intervened either in the rulings of the said circuit court upon the evidence offered by the plaintiffs in said suit or objections thereto, or in the rulings of the said circuit court upon the evidence offered by the defendant or the rejection of the same; and they pray that the Supreme Court of the United States, before the aforesaid justices thereof, now here may proceed to examine as well the record and proceedings aforesaid as the matters above for error assigned by the complaint or assignment of errors of said Francis O. J. Smith, and that the judgment aforesaid, in form aforesaid, given, may in all things be affirmed.

TRACY AND OLMSTEAD,
Attorneys for Defendants in Error.

CHAS. TRACY, *Of Counsel.*

Endorsed: Supreme Court U. S. Samuel F. B. Morse et al. adsm. Francis O. J. Smith. Joinder in error. Tracy & Olmstead, attorneys. Filed Jan'y 28, '69.

65 U. S. circuit court, S. D. N. Y.

S. F. B. MORSE *et al.*
vs.
F. O. J. SMITH.

The plaintiffs in this action consent that a return may be made by the clerk of this court to the Supreme Court of the United States, as an addition to his previous return to the defendant's writ of error from that court, such additional return to contain and consist of the bill of exceptions, the assignment of errors, and the joinder in error on file in this court, and to be of like effect as if a certiorari had been issued to bring up said bill of exceptions, assignment of errors, and joinder in error.

Feb. 18, 1869.

TRACY AND OLMSTEAD,
Plaintiffs' Attorneys.

Supreme Court

OF THE

UNITED STATES.

FRANCIS O. J. SMITH,
Plaintiff in Error,

Against

SAMUEL F. B. MORSE, ET AL.,
Defendants in Error.

ARGUMENT FOR PLAINTIFF IN ERROR.

RICHARD H. HUNTLEY,
Of Counsel for Plaintiff in Error.

NEW YORK:
BAKER & GODWIN, PRINTERS,
PRINTING-HOUSE SQUARE.
1860.

Supreme Court

OF THE UNITED STATES.

FRANCIS O. J. SMITH,

Plaintiff in Error,

against

SAMUEL F. B. MORSE, *et als.*,

Defendants in Error.

Argument for the plaintiff in error.

FACTS.

This is an action of covenant avowedly brought on the instrument set out at page 8, commencing at folio 20, sealed and dated October 8, 1859, at page 10, folio 24.

The declaration (page 2, folio 4) sets out the covenant upon which reliance was had to sustain the action, as follows:—"And whereas, in and by the said mutual agreement in writing, it was mutually covenanted and agreed by and between the said plaintiffs of one part, and the said defendant of the other part, that the said claims above mentioned should be referred to the final decision and arbitration of Thomas R. Walker and H. O. Alden, esquires, and an umpire, if needful, who should adjudicate the same upon and according to facts," &c.

The agreement thus referred to is also described in the declaration, at folio 3, as "a certain mutual agreement in

writing, then and there made between the said plaintiffs, by the name and description of Samuel F. B. Morse, and the executors of Alfred Vail, deceased, of the one part, and the said defendant of the other part, which the said plaintiffs now bring into court, here sealed with the seal of the said plaintiffs, by Amos Kendall, their agent, and also sealed with the seal of the said Kendall in his own right, and also sealed with the seal of the said defendant, the date whereof is the same date and year last aforesaid," which date at the top of page 2, is October 8, 1859, the same as at folio 24.

The breach of the covenant is stated at folio 8, page 4, to be that the defendant "disregarding his said covenants and agreements, has neglected and refused hitherto, and still neglects and refuses to perform the said award, or to make the payments aforesaid or any part thereof."

The defendant denied that the covenant set out was his deed, and when the plaintiffs attempted, on the trial, to show that it was so, by the introduction of the sealed instrument embraced in folios 20 to 24, pages 8, 9, and 10, the defendant objected to the introduction of that instrument, because, on the face of it, it was not the covenant declared on, inasmuch as it limited all parties, plaintiffs and defendant, as well as the arbitrators named, and the umpire not yet named, as follows at folio 23, pages 9 and 10—"And it is agreed between the said parties, that, in respect to the first of said claims, the same shall be referred to the final decision and arbitration of Thomas R. Walker, and H. O. Alden, esquires, and an umpire if needful, *as provided in articles of submission this day executed*"—the limitation in the words in italics being omitted in the declaration. Other objections were taken to the introduction of said instrument, all of which are set out in the form in which they were taken at folio 18. These objections were overruled by the court, and the defendant duly excepted.

The plaintiffs then offered in evidence an unsealed memorandum, indorsed on said sealed instrument, and

dated December 13th, 1859, more than two months after the sealed instrument was dated. That memorandum is set out at folio 25, page 10 and is as follows:—"We, the within named parties hereby agree and bind to abide and perform the award of the within-named arbitrators, without exception to or appeal from their decision."

"New York, Dec. 13, 1859."

The defendant objected to the introduction of this parol memorandum as evidence, and the objections were taken in the form set forth at folios 19 and 20, page 8, which objections were overruled by the court, and the ruling was excepted to by the defendant.

It will be noticed that said memorandum says nothing of an umpire; but binds the parties "to abide and perform the award of the within-named arbitrators."

The plaintiffs then offered in evidence the letter of the defendant to Peter Cooper, on page 11. This was objected to by the defendant on the ground that the letter was written on the 5th of October, 1859, three days before the covenant or sealed agreement was executed, and did not constitute a part of it; and also on other grounds stated at folio 26, pages 10 and 11. The court overruled the objection and the defendant excepted to the ruling.

The defendant also objected to the introduction of the award made by Abijah Mann, jr., for the reasons stated at folio 30, page 12. The court overruled the objection and the defendant excepted.

The defendant also objected (at folio 43, page 18) to the introduction in evidence of the will of Alfred Vail, deceased, as incompetent and irrelevant. The object of the evidence was to prove, not only the appointment of the executors, but authority to bring this suit for them. The objection was overruled and the defendant duly excepted.

The defendant (at folios 59 and 60, page 24) offered to prove that certain contracts between the parties to this suit, referred to in the covenant contained in the declaration, dated Oct. 8, 1859, were not considered by the arbitrators nor by the umpire, but the court excluded the evidence to which the defendant duly excepted.

ARGUMENT.

Upon this review of the facts it is clear that the action is brought on a covenant to arbitrate; that it is sustained by the indorsement on the covenant set out at folio 25, page 10, and by the letter to Peter Cooper, and the decision of the umpire. The defendant claims that said indorsement and letter cannot be considered in this action.

I.

What was the defendants' covenant? It is set out at folio 23, page 9, and is as follows: "And it is agreed between the said parties, that, in respect to the first of said claims, the same shall be referred to the final decision and arbitration of Thomas R. Walker and H. O. Alden, esquires, and an umpire if needful, as provided in articles of submission this day executed."

This is the only covenant to arbitrate. But the plaintiff below did not declare on such covenant. And this covenant did not and could not sustain the one declared on. The variance shown in the omission of the words "as provided in articles of submission this day executed" (fol. 4, page 2) is a fatal variance and justifies the defendant's plea that he made no such deed. Greenleaf says: (1 Greenl. Evidence, § 69) "If a qualified covenant be set out in the declaration as a general covenant, *omitting the exception or limitation*, the variance between the allegation and the deed will be fatal.

That the covenant, as made on the 8th of October, did not contain the final agreement of the parties as to arbitration and was not intended to contain such final agreement is clear from the fact that the parties did not proceed to arbitrate under it. They both deemed a further agreement necessary. And undoubtedly they did intend at

once and on the same day to "provide" and "execute" "articles of submission." But this was not done.

Now what is the covenant? Not absolutely to submit to arbitration, as stated in the declaration; but to submit as should hereafter be determined, and according to articles now to be executed; or, as the covenant says, "as provided in articles of submission this day executed."

For this variance, the covenant offered in evidence should have been excluded.

II.

But if there were no variance, how then would the case stand? Still the covenant is not absolutely to submit to arbitration, but to submit according to another agreement yet to be made. Can the plaintiff recover without showing that the "articles of submission were executed?" Suppose that in preparing the articles of submission the parties had irreconcilably disagreed upon the terms, and *therefore* no articles were executed, would the covenant to arbitrate be binding? Clearly not. Then why binding when no articles were executed for any cause?

III.

The articles, when executed, were or were not to permit of an umpire. If an umpire was contemplated, then the indorsement of December 13th is not within the spirit of the covenant. If an umpire was not contemplated, then none of the proceedings before Mr. Mann can be sustained. How then can the plaintiff stand on the covenant?

IV.

The plaintiff below saw this difficulty, and endeavored to evade it; hence he sought to introduce the indorsement of December 13th and the Peter Cooper letter. The de-

fendant insists that this indorsement and letter, being not under seal, cannot be introduced to aid or support a covenant. Both are parol, and yet they are introduced into this case with all the dignity and authority of sealed instruments.

V.

But if the indorsement of December 13th is to be admitted into the case, then the plaintiff cannot recover by reason of it. Not on the covenant; if so, why introduce the indorsement? Not on the indorsement; for in that the parties only agree to abide the award of the particular arbitrators therein named. No umpire is contemplated.

The same may be said of the letter to Peter Cooper, except it is to be observed that so far as that letter refers to an umpire, it is superseded by the indorsement executed more than two months afterward.

It is also to be remembered that when the covenant was executed (October 8th), the Cooper letter was already in existence (October 5th), and was not referred to.

VI.

The question then arises, where is there authority for the proceedings before the umpire? Not in the covenant to submit; for that was conditional upon a further agreement. Not in the Peter Cooper letter; for that was superseded by the indorsement of December 13th. Not in the last-named indorsement; for that explicitly excludes the idea of an umpire.

The plaintiffs also saw all these difficulties, and therefore they introduce proof that the parties went before an umpire, who subsequently made his award.

Had this been an ordinary action on the case, it is doubtful if such liberality could have been allowed; but in an action of covenant, where is there room for it? The

action was not on the award, except as it followed and was incidental to the covenant, which it has already been shown cannot sustain it.

VII.

What is there in this case more than this? The parties having a difference, voluntarily, and without formality, go before a sole referee, who afterward makes his report of his conclusions. This is all of it, and on such a simple statement can this action, in its present form, be brought?

VIII.

The defendant below viewed the matter as a simple voluntary appearance before Abijah Mann, Jr., and for that reason he sought to show that he ought not to be compelled to abide the decision, because Mr. Mann did not consider all the matters referred to him. But the court excluded this offer, though it was coupled with the offer to prove that the matters not considered were the contracts referred to in the covenant of 8th October, as matters which should be submitted to arbitration.

IX.

Turning again to the action as in covenant, we find Mr. Kendall testifying (at folio 57, page 23), "There were no writings or documents of the character of articles of submission between the parties other than the sealed instrument, subjoined memorandum, indorsed agreement, and correspondence already in evidence."

Certainly no *unwritten* agreement was testified to.

But the sealed instrument of Oct. 8, contained no covenant to abide an award; and it has been shown that the other writings were not agreements to abide the decision of an umpire.

The covenant was to arbitrate, as provided in certain

articles, and there are but two ways to show a breach of such covenant: 1st, that there were such articles; and 2d, that the defendant refused to arbitrate as provided by them, and the plaintiffs have failed in both propositions.

Again, if the covenant is supplemented by the indorsement of December 13th, then the plaintiffs must prove, 1st, that the arbitrators "within named," made an award; and 2d, that the defendant refused "to abide and perform the award of the within-named arbitrators." Here again they have failed in both propositions.

The authorities sustain the proposition that, without the indorsement of December 13, there was no submission.

Baxter v. Ryerss, 13 Barbour, 267–285.
2 Parsons' Contracts, 5th ed. 512.
Bacon's Abr. Tit. Leases, K.

And the indorsement not being under seal, cannot be proved to aid or sustain an action of covenant.

2 Greenl. Ev. § 235.
Philips v. Rose, 8 Johnson, 391.

And in covenant the submission must be by deed.

2 Greenl. Ev. § 69.

And this indorsement being the only submission, no *provable* submission was made.

But there are additional reasons why the letter of Mr. Kendall to Mr. Cooper should not have been admitted in evidence.

1. It does not purport to be between, or binding upon, any other parties than Kendall and the defendant.

2. There are two conditions annexed by the defendant to be performed by some other party with whom he was contending, and there is no proof that those conditions—though accepted—have been performed. If the award had been that the plaintiffs should perform these conditions, they would have been compelled to show performance before they could sustain an action on the award (Jesse v. Cater, 28 Alabama, 475), and surely an *agreement* to perform a condition can be no less binding.

X.

The defendant objected to the introduction of the covenant and agreements on the ground that they were not proven to be signed by any authorized agent of the plaintiffs. There is no proof that Amos Kendall was their agent, or that they authorized him to sign for them or to affix their seal to this instrument.

The plaintiffs then, as far as appears in the case, are not bound by Mr. Kendall's signature; the covenant and indorsement then are void for lack of mutuality, and inasmuch as the defendant cannot enforce them against the plaintiffs, how can they enforce them against him?

The *mode* of signing here claims attention. Mr. Kendall first binds himself; but, as he is not a party to the suit, that is immaterial at present; and then he adds, "and as agent for Samuel F. B. Morse and the executors of Alfred Vail, deceased." This does not bind Morse, even, much less "the executors of Alfred Vail, deceased," who are not even named.

Bacon's Abridgment, Tit. Leases I. 10.
Clark v. Courtnay, 5 Peters, 319–350.
Spencer v. Field, 10 Wendell, 87.
1 Parsons on Contracts, 54.
Stackpole v. Arnold, 11 Mass. 27.

And though the rigor of the rule has been somewhat relaxed, the rule itself has not been impaired or invaded in the case of sealed instruments, or of any instruments signed as these are.

1 Parsons' Contracts, 5th ed. 55.

There was also no proof of ratification by Kendall's assumed principals; and such ratification, so far as relates to the sealed agreement, could only be under seal.

1 Parsons' Contracts, 5th ed. 52.
Stoiglitz v. Egginton, Holt, 141.
Stetson v. Patton, 2 Greenl. R. 358.
Dispatch Line v. Bellamy Manuf. Co. 12 N. H. 205.
Hunter v. Parker, 7 M. & W. 343.

See, also, as to necessity for authority under seal,
Hanford v. McNair, 9 Wendell, 54.
Worrall v. Munn, 5 N. Y. (1 Seld.) 229.

The only exception to the rule that the authority to execute a deed must be by deed, is when the agent or attorney affixes the seal of the principal in his presence and by his direction.

Hanford v. McNair, *supra*, per SUTHERLAND, J.
Coke Litt. 52 a.
Comyns' Dig. tit. attorney, c. 1, c. 5.

XI.

The defendant objected to evidence of the appointment, in writing, of an umpire (folios 29 and 30, page 12).

There is no authority to appoint an umpire unless it is found in the Cooper letter. This letter was written Oct. 5, and afterward the agreement declared on was entered into, in which the words "an umpire to be appointed by them if they do not agree" are carefully excluded.

And then on the 13th of December, the indorsement is made, by which the parties agree to abide the award of the within-named arbitrators, the idea of an umpire being again excluded.

On what principle then can it be said that the arbitrators were authorized to appoint an umpire? Not on the papers, certainly; and if it is claimed that the appearance of the parties before the umpire ratified his appointment, the answer is that such claim renders the paper appointment immaterial and unnecessary, and in any event reduces the action to *assumpsit* on the award.

It is also to be observed that the authority to appoint an umpire and to arbitrate (contained in the Peter Cooper letter) is coupled with the condition that the decision shall be within sixty days; and this condition was accepted by the defendant. No award was made in sixty days;

and the umpire dates his award, "May 22, 1862," nearly eighteen months after this letter was written; and there is no proof of any waiver of this condition on the part of either party.

If it is answered that the decision was to be within sixty days from the appointment of the umpire, still the condition was not complied with, as the appointment is dated "February 15, 1862," ninety-seven days before the award.

The award itself seems to exclude the Peter Cooper letter, as it will be observed that it commences with the words "On the *Eighth* of October, 1859, there was an adjustment," &c. This was three days after the letter was written.

XII.

The objection that Amos Kendall should have been made a party to the action was well taken.

Bacon's Abr. Covenant, Tit. D.
Yelverton, 177.

The citation from Yelverton is as follows:

"In an action between A. and B. of one part, and C. of the other part, among other covenants there is one thus, viz.: It is agreed between the parties that C. shall enter into a bond to B. to pay him £100 at a day; in an action for nonperformance A. and B. must join."

XIII.

Though this action was in covenant, the proofs were *in assumpsit.*

1 Chitty Pleadings, 101.
Brady v. The Mayor of Brooklyn, 1 Barbour, 584–592.
Hays v. Hays, 23 Wendell, 363.

And when the action took this form it opened the door for the defendant to show that the award was erroneous, and did not conform to any agreement of submission, and he offered proof accordingly, which the court excluded.

"It is an elementary and familiar rule, that an award must embrace all the matters contained in the submission, and there must be a positive adjudication upon each. It is true, that when the submission is not specific, but general, of all matters in difference or dispute, the award is valid, if it embraces all the matters of which the arbitrators had notice; but, on the other hand, it is wholly void when it appears either on the face of the award or from intrinsic (extrinsic?) proof that the arbitrators had notice of any matter, covered by the submission which they failed to decide."

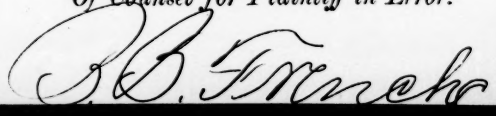
Moore v. Cockcroft, 4 Duer, 138, per OAKLEY, CH. J.
Watson on Arbitration, 121, and cases there cited.

The defendant, at folio 60, page 24, sought to place himself within this rule, and the exclusion of his testimony offered in that behalf was error.

XIV.

The case shows an attempt, through a particular form of action, to preclude the defendant from showing that injustice was done him by the umpire. The court will not aid that attempt. Let the action be on the award, as *assumpsit*, and the defendants' proposed evidence is available. But if covenant is insisted on so as to exclude such evidence, then this court will sustain the action only on the covenant; and, as has been shown, that cannot be done.

RICHARD H. HUNTLEY,
Of Counsel for Plaintiff in Error.



Supreme Court

OF THE UNITED STATES.

SAMUEL F. B. MORSE, ET AL.,

Defendants in Error.

adsm.

FRANCIS O. J. SMITH,

Plaintiff in Error.

ARGUMENT

ON THE PART OF THE DEFENDANTS IN ERROR.

CHARLES TRACY,

Of Counsel.

ALSO

OPINION OF MR. JUSTICE NELSON,

DELIVERED IN

THE CIRCUIT COURT OF THE UNITED STATES

FOR THE

SOUTHERN DISTRICT OF NEW YORK.

NEW YORK:

EVENING POST STEAM PRESSES, 41 NASSAU ST., COR. LIBERTY.

1870.

Evening Post Steam Presses, 41 Nassau St., cor. Liberty, N.

U. S. Supreme Court.

SAMUEL F. B. MORSE, *et al*,
Defendants in Error,
adsm.
FRANCIS O. J. SMITH,
Plaintiff in Error.

Argument on the part of the Defendants in Error.

This case comes up on writ of error to the Circuit Court of the United States for the Southern District of New York. The plaintiffs below obtained a verdict for $10,762 97, (Record, p. 8, f. 21.) The defendants below applied for a new trial, which was refused, and judgment was entered on the verdict, July 17, 1867, for $12,182 63, (Record, p. 8, f. 22.) The opinion of Mr. Justice Nelson, delivered on refusing the new trial, is annexed to this argument.

The only questions now to be considered, are those arising on the rulings, which admitted or rejected evidence, (See the Assignment of Errors, or "Complaint," Addition to Record, p. 25, f. 62, 63.) Those rulings are found in the Addition to the Record, and are as following: Receiving in evidence the sealed instrument (p. 7,

8, f. 18, 19,) writing of indorsement, (p. 8, f. 19, 20,) certain correspondence, (p. 10, 11, f. 26,) proof of the appointment of an umpire, (p. 12, f. 29,) the award, (p. 12, f. 30, 34,) the will and accompanying documents, (p. 18, f. 43,) rejecting evidence as to papers not considered by the arbitrators, (p. 24, f. 59, 60.) The Counsel for plaintiff in error has submitted his argument on such exceptions. The Counsel for defendants in error now presents his argument under the following points.

First.

Covenant was the proper form of action in a suit for the non-performance of the award. If debt or assumpsit could have been sustained, this pleader, for obvious reasons, would have preferred either of those forms of action to covenant.

(1.) A suit sometimes is spoken of as if brought upon an award; yet, in exact truth, the action must be founded on the submission, although its object is to recover the thing awarded, or its equivalent, in damages. The award is not a judicial record, unless so made by a rule of Court on stipulation, which was not the case here. The award itself is not the contract of the parties. It is, in pleading, matter of inducement only. The action is and must be founded on the contract of submission.

"The action is not brought on the award, but on "the submission."

Viner's Abridgement, title "Arbitrament," C. a., 4.
Dod v. *Herbert, Styles*, 459.

(2.) The agreement for the arbitration in this case was by a sealed instrument, set forth in Addition to

Record (p. 8–10, fols. 20–24). That specialty contained several releases, settlements, and stipulations. The parties, however, expressly excepted from its operation two claims, enumerated as first and second claim (p. 9, fols. 22–23); and the parties agreed that the first of said claims "shall be referred to "the final decision and arbitration of Thomas R. "Walker and H. O. Alden, Esquires, and an um-"pire if needful" (p. 9–10, fols 23–24).

This is a covenant under seal, and binds the parties to the observance of the award. A covenant to submit matters to final decision and arbitration is a covenant to submit to the award,—to stand to and abide by the "adjudication" of the arbitration. The party prevailing on an arbitration, in such a case, cannot maintain assumpsit upon the submission and award, because the contract is under seal.

Watson on Arbitration, 355.

(3.) The plaintiffs below could not maintain an action of debt in this case; because the things awarded consist, in part, of shares of stock (Addition to Record, p. 17, fol. 43), and debt does not lie unless the award is for money only.

Watson on Arbitration, 352.
2 *Tidds Practice*, 887.
2 *Saunder's Reports*, 62. *a. nt.* 5.
1 *Chitty's Pleading*, 123, 128.

(4.) The unsealed writings between the parties do not change the nature of the plaintiffs' demand, or the choice of the proper form of action.

All such writings which preceded the specialty, are merged in it.

And all such writings made after the specialty, do not change the right and necessity of bringing, the

action in the form required by the sealed instrument.

Barber v. *Harris*, 9 *Adol. & Ellis*, 532.
Morton v. *Burns*, 7 *id.*, 19, 26.
1 *Chitty's Pleading* (*6th Eng. Ed. and 7th Am. Ed.*), 117.

(5.) The doctrines of common law pleading, therefore, left no question as to the proper form of action for this case. The award not being wholly for a sum of money, and there being no penal sum in the agreement, debt would not lie; and the submission being by specialty, assumpsit would not lie. But the action of covenant was precisely adapted to the case.

Second.

The technical objection of a variance betweent he declaration and the proofs, has no foundation.

(1.) The declaration describes the covenant according to its legal effect.

Although the sealed instrument, after expressing the agreement to submit, adds the words "as provided in articles of submission this day executed," (Addition to Record, p. 10, fol. 24,) yet in fact no articles of submission existed except this same sealed instrument itself. This is proved by Mr. Kendall, (Addition to Record, p. 12, fol. 30,) and Mr. Walker, (Addition to Record, p. 24, fol. 60) The previous correspondence could not have been referred to, as it was not "Articles of Submission," nor executed on that day—the correspondence being dated October 5, 1859, (Addition to Record, p. 11, fols. 27, 28,) and the sealed instrument being

dated October 8, 1859, (Addition to Record, p. 10. fol. 24.) The correspondence on its face shows that the sealed instrument need not have been made at the time of the correspondence. The umpire in one instance seems to give the name of articles of submission to this correspondence, yet it is evident that such an instrument as the articles of submission mentioned in the covenant never was made. There was no necessity for making any such instrument, the covenant itself being sufficient for all purposes; and hence none was made. There being in fact no separate "Articles of Submission" in existence at the making of the covenant, the reference to such a paper was a mere nullity and formed no part of the contract of submission made by the covenant itself, and ought not to be stated in the pleadings, where the legal effect of material stipulations alone is to be observed.

1 Chitty's Pleading, 334.

The plaintiff in error's first and second points assume a false construction of the covenant, as if it contemplated articles of submission yet to be executed. The covenant will bear no such interpretation It speaks of the articles as already executed "as provided in articles of submission this day executed." (Addition to Record, p. 10, fol. 24.) In fact none having been theretofore executed, the covenant stands perfect, while that clause is a harmless nullity.

(2.) The parties in fact went before the arbitrators upon the sealed instrument, and proceeded with the hearing without any production of other "Articles of Submission," and thereby waived all requirement of such separate articles, if they had been entitled thereto, and gave a conclusive interpretation to their covenant. (Testimony of Mr. Walker. Addition to Record, p. 12, fol. 30.)

(3.) The memorandum made by the parties at the foot of the sealed agreement, when they appeared before the arbitrators on the 13th of December, more than two months after the making of the sealed instrument itself, conclusively shows that the arbitration was to be had upon the sealed instrument alone. "We, the within named parties hereby agree and bind ourselves to abide and perform the award of the within named arbitrators, without exceptions to, or appeal from their decision." (Addition to Record, p. 10, fol. 25.) Of course such a parol writing could not change the covenant into an assumpsit, even if it made material changes in the submission. (7 Ad. & El., 19, 26; 9 Ad. & El., 532, 1 Ch. Pl. 11 , above cited,) But in fact this writing did not attempt to change the submission at all. It merely repeats the obligation already existing to abide the award, and adds that the parties will not except to nor appeal from the award—another thing to which they were equally held by the sealed submission itself This memorandum therefore stands as a proof that when the arbitration was about to begin, and more than two months after the sealed instrument was made, there were no articles of submission except the sealed instrument; for if there had been, this memorandum would have referred to such articles, and not treated the arbitration as resting wholly and exclusively on the sealed instrument. This memorandum amounts to an open declaration of the parties that they then proceeded to trial under their covenants in the sealed instrument. (Addition to Record, p. 8, fol 19.)

(4.) It is proper to notice here the criticism of the plaintiff in errors brief on the wording of this memorandum endorsed on the sealed agreement. It is said the parties agree to abide by the award of the Arbitrators and do not add that of the umpire. But the umpire is an arbitrator, and included in the phrase 'within named arbitrators,' because the nomination of him

is provided for within, and the phrase used includes that idea. If, however, the parties made this fresh parol promise to keep a part of their solemn covenants under seal, they remained fully bound by that sealed instrument to perform both that part and all other parts of their covenants.

(5.) This whole objection of variance is a mere matter of criticism without merits, and does not point to anything material to this action. It is the objection of merely a negative and not a positive variance, of a thing omitted and not of a false allegation inserted, so that the defendant could not be misled: of a verbally defective description of an instrument, of which the party had oyer in the suit, and of which he held the duplicate original and also a printed copy which he used on the trial: of a totally immaterial variance which is cured and saved by the statute of jeofails, and must be disregarded on the trial.

Act of 1789, *c.* 20, § 32; 1 *U. S.* 91.

Smith v. *Jackson*, 1 *Paine*, 486, *Per Thompson*, *J.*, (p. 490). "This power over such defects of form extends as well to the Appellate Court as to the Court where the proceedings have been had; not that the amendment is always actually made in the Appellate Court, but the defect is not to be regarded as matter of error" * * "The last clause in the act, however, may be extended further, and embrace matter of substance," * * "This power is confined to proces and pleadings, and reaches all defects."

Third.

There was no defect of parties. Mr. Kendall had no cause of action and could not be joined as plaintiff. He

was no party to the award, and therefore had no *gravamen* to sustain a suit in his name.

(1.) Although Mr. Kendall was one of the parties to the instrument, it was only for the purpose of giving and receiving releases of those demands which were not submitted. The persons agreeing on an arbitration were a part only of those who joined in other portions of the instrument.

(2.) The things submitted are stated under the first reservation, (fols. 39–41,) being the opposing claims of Smith against Morse and Vail, and of Morse and Vail's executors against Smith. (Addition to Record, page 9, fols. 2–3.) No mention is made of Mr. Kendall as party to such claim. The prior correspondence had the same view: "Any balance found due to Mr. Smith on the one hand, or to Morse and Vail on the other." (Addition to Record, page 11, fols. 27–8.)

(3.) The award also properly followed the submission, neither awarding anything to Kendall or against him, but awarding to Morse and the executors of Vail. (Addition to Record, page 17, fols. 42–3.)

(4.) If the covenant to submit had expressly named Kendall as a party submitting, thus: "Morse, the executors of Vail, and Kendall," still such covenant would be in its nature several, and to be enforced against or for the persons designated by the award. A claim of three persons being submitted, it may appear on the trial of the arbitration that one has been paid, or has released his interest, or is otherwise not entitled to an award in his favor, and the award in such case should then be made in favor of the other two; if a claim against three is submitted, it may appear that two only are liable, and the

award then should be against such two only. In either case the submission is treated distributively, and the covenant of the two designated by the award is to be enforced as to them alone.

(5.) Kendall having no cause of action nor any share in the demand to enforce the award, ought not to be made a party to the suit, and could not be without exposing the plaintiff to certain defeat in the action. In all cases the plaintiffs must be those who have a right to recover, and no others. (1 *Chit. Pl.*, 1–2.) The cases where an assignee sues in the name of his assignor, depend on the principle that such assignor once had the cause of action and is deemed to have it still, because his assignment cannot be recognized in pleading; but here Mr. Kendall never had any cause of action and he has made no assignment.

Fourth.

The objection that Vails executors could not join in the arbitration, is wholly unfounded.

(1.) It is the right of executors to submit controverted demands to arbitration. (*Rolles Abridgement*, "*Arbitrament*," *D. pl.* 2, 3; 2 *Strange* 1144, *Ellston* v. *Cummins*; 1 *Term*, 691 *Barry* v. *Rush*; 5 *Term* 6, *Pearson* v. *Henry*; *Dayton's Surrogate* 450; *Toller on Executors* 425, *Caldwell on Arbitration* 14, *Watson on Arbitration* 74.)

(2.) In this case the submission was made in October, 1859, (Addition to Record, p. 10 fol. 24), and the executors had received their letters testamentary in

February, 1859, eight months previously (Addition to Record, p. 22, fol. 54). If it had happened, as the plaintiff in error's counsel seems to suppose, that the letters were not issued till after the submission was made, they still would have sustained it by relation back to the death of the testator, the probate of whose will was had in February, 1859, (Addition to Record, p. 21, fol. 53. (*Willard on Executors*, 147; *Tollers' Law of Executors* 45, *et seq.*)

Fifth.

The objection that Mr. Kendall had not authority to sign the submission for the plaintiffs below, is groundless.

The defendant below admitted Kendalls authority by appearing and going to trial and argument before the arbitrators and the umpire, where Kendall represented the plaintiffs; and the defendant below now comes too late to make the objection. (Addition to Record, p. 23, fol. 57; 15 *Wendell*, 652 *Ackerman* v. *Finch.*)

The plaintiffs below adopted Mr. Kendall's agency in making the submission by bringing this suit upon it as their own act. No higher ratification could be given; and every ratification relates back, and is equivalent to a prior authorization. (*Ommis ratihabitio retrotrahitur et mandato æquiparatur. Brooms's Maxims* 380–383; *Story on Agency*, § 248.)

The criticism about the mode of signing, also, is not authorized. Where the body of the writing shows that the plaintiffs were the contracting parties, the agent may sign in either form—A. B. by C. D., agent, or C. D. agent for A. B. It is only where a contract does not name a principal, but runs in the name of "I," or "me," and is signed C. D. agent of A. B., that C. D. is personally held. Moreover, the only persons to object are the principals; and they have adopted the act of this agent.

This is not a question of charging Kendall with liability, as was the case in the adjudication cited by the plaintiff in error. If the sealing on the part of *Morse* v. *The Executor of Vail*, were not technically authorized, yet the submission would be good as to them without seal; and if defeated on the arbitration they might be sued in assumpsit, while Smith having personally sealed, and being defeated, is liable in covenant.

Sixth.

The umpire was duly appointed, and his sole award is valid.

The appointment of the umpire was made in due form (Addition to Record, p. 12, f. 29–30), and was fully recognized by the parties appearing before him to advocate their claims. (Addition to Record, p. 23, f. 57.)

The appointment of an umpire to decide where the original arbitrators disagree, always belongs to the arbitrators themselves. Although differing as to the questions submitted, they may well agree on the naming of an indifferent and suitable third person to decide between them.

The award in such cases is properly made by the umpire alone. (4 *Duer*, 318, 325, *Lyon v. Blossom*; *Billings' Law of Awards*, 106 113–114; 4 *Taunton* 232, *Beet v. Sargeant*; *Watson on Arbitration*, 86 *et seq.*

Seventh.

There was no error in receiving in evidence the prior correspondence and the subsequent memoranda not under seal. The production of that correspondence was

necessary to the perfect showing that there were no articles of submission such as mentioned in the sealed agreement; and the production of the two subsequent memoranda was material to the proof that the defendant recognized Mr. Kendall's authority, and also that both parties went to hearing with the knowledge that no such articles of submission existed. None of these parol writings were received to impair the force of the sealed instrument. They were in harmony with it.

Eighth.

The evidence offered by the defendant below to impair the force of the award, was inadmissible. (Addition to Record, p. 24, f. 59, 60.)

The award was final, and the Court is not to look into any question about the evidence which was before the arbitrator. (*Watson on Arbitration*, 378–9.)

Ninth.

Remarks upon some parts of the agreement submitted by the counsel for the plaintiff in error.

(1.) His point VI. erroneously states the covenant of submission to be conditional. On the contrary, it was an absolute agreement of submission, naming two arbitrators and providing for an umpire. After thus fully instituting an arbitration, the instrument makes a reference to another paper as if it were in existence, which in fact was not in existence. It does not read "as it shall be provided," but simply "as provided." Such other paper, if it had been in

existence, could not have made the sealed agreement more or less than a covenant of submission to the same arbitrators with the same provision for an umpire. It might have contained minor stipulations about time, place, and mander of proceeding, but it would not be substantially different from the terms of the sealed contract. Moreover, in fact it did not not exist; and, therefore, this reference to it is a mere nullity.

(2.) The struggle to exclude the correspondence, in his Point IX., seems to be carried on without noticing the view with which it was introduced, or the ground of its admissibility. This correspondence is a part of the history of the transaction, and together with the memoranda following the sealed agreement, it covers the whole period from the first suggestion of an arbitration down to the hearing itself, and shows that there never were any separate articles of submission, and that the reference thereto in the agreement, is a nullity. The agreement was doubtless prepared and in readiness before its execution and the draughtsman may have contemplated framing separate articles of submission to be signed before the agreement itself; but when the parties came to execute the agreement, its terms being sufficient, no separate articles were executed or prepared, and the arbitration stood on the agreement alone.

(3) His points XIII and XIV are wholly unfounded. The form of action was not optional. It was controlled by the rules of pleading. The seal of Smith on the agreement, prevented suing him in assumpsit; and inasmuch as the award was not wholly for the payment of money, debt would not lie. Our only remedy was in covenant.

Nor does the action of covenant impair any right of defence. Whatever defence could have been made

in assumpsit, could be made in covenant. The defendant below had full liberty of pleading, and he put in several pleas. (Addition to record, p. 5, fol. 10–13). On the trial no defence was excluded for defect of pleading.

(4.) The only evidence the defendant below offered on the trial, is found in Addition to record p. 24, fol. 59–60.

This was an attempt to review the action of the arbitrators on the merits. Nothing of that sort can be done. There was no charge of fraud in arbitrators or umpire, and no bill was filed to set aside their proceedings as fraudulent.

The record and bill of exceptions contain no copy of the papers offered, nor any statement of their contents. There is nothing to show that they were material or relevant; much less anything to show that the defendant below was injured by their rejection. (*Prentice v. Zane*, 8 *Howard*, 470, 486. *Hyde v. Boordem*, 16 *Peters*, 169).

(5.) In his point XI, it is erroneously stated that, "There is no authority to appoint an umpire, unless it is found in the Cooper letter." On the contrary the covenant expressly provides for an umpire, thus: —"and an umpire if needful." (Addition to record p. 10 fol. 24). The naming of an umpire always belongs to the arbitrators.

(6.) The criticisms as to the manner of executing the sealed agreement, and as to the authority of Mr. Kendall to seal for the plaintiffs below, and as to the effect of the subsequent unsealed memoranda, are wholly without force.

Smith sealed the agreement, and hence the action against him must be in covenant.

If Kendall's sealing had not been duly authorized,

his signing was fully ratified, and his principals were bound either by simple contract or by specialty. One party to a contract may subscribe and the other may seal: the former is bound in assumpsit, the latter in covenant: both are bound in some way, and the contract is mutual and binds each party.

There being an agreement under seal, all previous parol writings are annulled; and no parol memoranda can take away the character of specialty given by the seal.

In the present case there was not even an attempt, by subsequent memoranda, to take away or change anything which had been covenanted in the sealed agreement. Mere promises not to appeal, and promises to proceed with the arbitration, and the like, add nothing to, and take nothing from the covenant.

(7.) The cases cited in the plaintiff in error's argument, are mainly inapplicable to the case.

In *Rolls* v. *Yate*, (*Yelverton*, 177,) the covenant sued on was made by the defendant to two parties. In the present case, the covenant was made by Smith with Morse and the executors of Vail. Kendall was not a party to the submission. He was party to other agreements contained in that instrument; but he was not a party to so much of the instrument as provided for an arbitration, nor was he interested in the claim to be arbitrated upon. The instrument expressly excepts that claim out of the settlement, and then those parties who were interested in that claim submit it to arbitration.

Warral *v.* Munn, (5 N. Y., 229,) is in our favor. See p. 241.

Tenth.

The whole case shows a meritorious cause of action in favor of Morse and the executors of Vail against Smith.

The defence has consisted of technical objections, without touching the merits. The Court favors the determination of controversies by arbitration, and discourages subtle attempts to defeat the effect of an award. In this case the arbitration was resorted to on the settlement of previous litigation. (Addition to Record, p. 8, fols. 19–22.) It was designed for the determination of certain things which the parties had not agreed on or compromised between themselves, and it was the intention of the parties thereby to bring such remaining controversy to a speedy and final decision; but the plaintiff in error refuses to comply with the award, and we are now, in the eleventh year since the submission, demanding the fruits of the award, and still are met by no show of defence on the merits.

CHARLES TRACY,
Of Counsel for the Defendants in Error.

Evening Post Steam Presses, 41 Nassau St., cor. Liberty, N. Y.

Circuit Court

OF THE UNITED STATES,

For the Southern District of New York.

Samuel F. B. Morse *et al.*,

vs.

Francis O. J. Smith.

Opinion of the Circuit Court on the denial of the Defendant's motion for a new trial.

Nelson, Justice,—This is an action of covenant against the defendant founded on a submission to an award of arbitrators. The submission is inartificially drawn, and most of the objections that were taken during the trial arose out of this circumstance. The merits of the case are quite plain, and easily arrived at.

The submission shows that a litigation was existing between Morse and the executors of Vail, against Smith, arising out of certain agreements concerning Morse's telegraph; and that all suits and causes of action be-

tween the parties, and also, all causes of action between Kendall and Smith, had been amicably adjusted and finally and irrevocably settled, with the following specified exceptions, namely:

First.—A claim for stock, and dividends in the Washington and New Orleans Telegraph Company, on the part of Smith against Morse, and the executors of Vail, and also, a like claim on the part of Morse and executors against Smith.

Second.—A claim of Smith against Morse for moneys received for the invention of the telegraph from sources out of the United States. These claims were submitted to Thomas R. Walker and H. O. Alden as arbitrators, and in case of disagreement they were to appoint an umpire. The case was heard before the arbitrators, who disagreed, and appointed Abijah Mann as umpire. The case was again heard before him, all parties appearing and producing their proofs, and on the 22d of May, 1862, he made his award in favor of Morse and the executors, of certain amounts payable in stock and in money, as per submission. The award is upon the subjects submitted to the arbitrators and umpire for a hearing and determination, and is not reviewable here. Indeed, we perceive no reason for doubting its entire correctness, if examinable.

A principal objection is, that the submission, after naming the arbitrators, refers as follows: "As provided in articles of submission this day executed," which articles were not produced at the trial, nor before the arbitrators or umpire, and, in truth, had no existence. The facts are, as appeared from the proofs, that the parties through their friends had informally agreed on the terms of the submission which were incorporated in the formal submission under seal, and the inartificial draftsman must have had in his mind this informal previous arrangement in the reference made. What confirms this explanation is that both parties appeared before the arbitrators and umpire, and no notice was taken of this part of the sub-

mission or objection made on account of the non-production of these articles, but all parties assumed that the submission under seal contained the whole of the terms agreed upon.

Another objection is, that the submission was signed by Kendall individually, and that he was not made a party to the suit. But the submission contained covenants of settlement of various disputes and causes of action in which Kendall was personally concerned, and the instrument is to be construed distributively, which explains the meaning of his signature. The covenant of submission was exclusively between the parties to the suit, in which Kendall had no personal interest.

It is also objected that Kendall, who executed the submission as agent for Morse and the executors of Vail, had no power or authority as agent, nor was any shown, to do the act. But the instrument containing the settlement between the parties, and the submission, recited that Kendall was agent, and made the settlement as such for Morse and the executors, and agreed at the same time to the terms of submission; and Smith, who was a party to this settlement and submission, must have been satisfied with the authority. Besides, Kendall appeared throughout before the arbitrators and umpire on one side, as agent, and Smith on the other, and no objections were taken to his authority. We think the objection comes too late. Without pursuing the objections further, we think the verdict below was right, and a new trial must be denied, and judgment entered for the plaintiffs.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 207.

[redacted] PLAINTIFF IN ERROR,

vs.

[redacted] A. PARKER, JOHN W. J. CULTON, AND HAROLD SPRAGUE.

[redacted] COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

[redacted] JANUARY 23, 1903.